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Vol. 130. NEW YORK REPORTS.

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103

REPORTS OF CASES
DECIDED IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
(SECOND DIVISION)

FROM AND INCLUDING DECISIONS OF OCTOBER 20, 1891,
TO AND INCLUDING DECISIONS OF FEBRUARY 9, 1892,

WITH

NOTES, REFERENCES AND INDEX.

By H. E. SICKELS,
STATE REPORTER.

VOLUME CXXX.

ALBANY:
JAMES B. LYON.
1892.

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SECOND DIVISION.

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CHARLES F. BROWN,

JUDSON S. LANDON,⁵

ASSOCIATE JUDGES.

¹ Died January 14, 1892.

² Appointed Chief Judge, January 19, 1892, *vice* RUGER, Ch. J., deceased.

³ Appointed Associate Judge, January 19, 1892, *vice* EARL, J., appointed Chief Judge.

⁴ Resigned November 28, 1891, to take effect December 7, 1891.

⁵ Appointed November 28, 1891, to take effect December 7, 1891, *vice* POTTER, J., resigned.

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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
(SECOND DIVISION)

COMMENCING OCTOBER 20, 1891.

JAMES ALBERT HARRIS et al., Respondents, v. MONROE H.
OAKLEY, Appellant.

It seems that where, in the description of premises in a deed, courses, distances and monuments are given, the premises must be located according to the deed, and all parol evidence of the declarations and acts of the parties to the effect that a different location was intended is inadmissible, as contradicting or varying the deed; but where the description is so vague, obscure or conflicting as to leave the intent of the parties uncertain, their declarations and acts may be proven to determine the intent. H., was the owner of certain premises divided into two parts by a fence; on the north part was a hotel and outbuildings, the south part was used as a garden; he executed a conveyance to defendant, the description including the whole premises, "excepting and reserving therefrom 137 feet front and rear, measuring from George Harrison's north line, * * * being the piece of land occupied as a garden." H. thereafter conveyed to plaintiffs the portion not conveyed to defendant. The fence was 137 feet north of Harrison's line at the front end, but in the rear 137 feet extends nineteen and one-half feet north of the fence, and a line run from this point to the front parallel with Harrison's line would run diagonally through a barn or outhouse on the hotel premises. In an action of ejectment to recover possession of the triangular strip north of the fence, the court found that H., at the time of the conveyance to defendant, put him in possession of this strip, and that the same was in defendant's possession at the time of the conveyance to plaintiff. *Held*, that a judgment in favor of plaintiff was error; that as there were two conflicting descriptions of the land reserved in defendant's deed the declara-

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tions and acts of the parties were proper to be considered for the purpose of showing their intent; and that putting defendant in possession of all the land north of the fence was a practical location of the line and disclosed the intent to be simply to except the garden lot.

(Argued October 7, 1891; decided October 20, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 19, 1889, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Circuit without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

W. H. Whiting for appellant. The deed from Hulin to Harris, if it was intended to convey this triangular piece of land, was absolutely void as to such triangular piece of land under the Statute of Champerty. (1 R. S. 739, § 147; *Christie v. Gage*, 71 N. Y. 189; *Sands v. Hughes*, 53 id. 295; *Crary v. Goodman*, 22 id. 170.) The conveyance to Oakley was intended to and did embrace the premises in dispute. (*Robinson v. Kime*, 70 N. Y. 147; *French v. Carhart*, 1 id. 102; *Brookman v. Kurzman*, 94 id. 276; *Coleman v. Beach*, 97 id. 545; *Masten v. Olcott*, 101 id. 152; *Case v. Dexter*, 106 id. 54; *Thayer v. Finton*, 108 id. 394; *Ousby v. Jones*, 73 id. 621.) In the construction of these deeds, the intention of the parties is to be ascertained and carried into effect. (1 R. S. 748, § 2; *Donohue v. Case*, 61 N. Y. 631.) Parol evidence is admissible of any extrinsic circumstances tending to show what person or persons or what things were intended by the party or to ascertain his meaning in any other respect. (Greenl. on Ev. § 288; *Ely v. Adams*, 19 Johns. 313; *Donohue v. Case*, 61 N. Y. 631.)

Albert H. Harris for respondents. The plaintiffs' title to the triangular piece of land is not void by the Statute of Champerty. (*Crary v. Goodman*, 22 N. Y. 170; *Harris v.*

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Oakley, 17 N. Y. S. R. 198; *Dawley v. Brown*, 79 N. Y. 390; *Smith v. Faulkner*, 15 N. Y. S. R. 637; *Allen v. Welch*, 18 Hun, 226.) The legal title of the land in dispute is in the plaintiffs. (*Higinbotham v. Stoddard*, 72 N. Y. 98; *Smyth v. McCool*, 22 Hun, 595; *Brookman v. Kurzman*, 94 N. Y. 276; *Townsend v. Hayt*, 51 id. 656; *B., N. Y. & E. R. R. Co. v. Stigeler*, 61 id. 348; *Lovejoy v. Lovett*, 124 Mass. 270; 3 Washb. on Real Prop. 344.) The court did not err in excluding evidence of declarations and conversations tending to show another or different line or boundary from the line described in the deed. (*Clark v. Wetkey*, 19 Wend. 320; *Terry v. Chandler*, 16 N. Y. 358; *Partridge v. Russell*, 18 N. Y. S. R. 687; *Vosburg v. Teator*, 32 N. Y. 561; *Clark v. Baird*, 9 id. 203.) •

HAIGHT, J. This action was brought to recover the possession of certain real estate situate in the city of Rochester.

It appears that one Truman Hulin was the owner in fee of a parcel of land bounded on the north by Brooks avenue; on the east by what was formerly the Genesee Valley canal, now occupied by the Western New York and Pennsylvania railroad; on the south by land owned by George Harrison, and on the west by Genesee street. The lot was divided by a board fence running through to the canal nearly at right angles with Genesee street, which had existed for many years, and the land south thereof was used by Hulin for a garden. On the parcel north of the fence, there was a hotel with sheds, barn, ice-house, chicken-house, etc. On the 10th day of January, 1883, Hulin conveyed to the defendant and his father by warranty deed all of the premises above described, "excepting and reserving therefrom 137 feet, front and rear, measuring from George Harrison's north line on Genesee street; and also 137 feet from George Harrison's north line on the Genesee Valley canal, *being a piece of land occupied as a garden by said Hulin.*" And on the seventh day of May thereafter, he conveyed to the plaintiffs the whole of the premises first mentioned, excepting and reserving that portion thereof conveyed

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to the Oakleys. The fence forming the northern boundary of the garden lot upon Genesee street is 137 feet north of Harrison's line, but in the rear, upon the line of the canal, 137 feet from Harrison's line extends $19\frac{1}{2}$ feet north of the fence. The triangular piece embraced within this description north of the fence is the parcel of land in controversy.

The trial court found as facts: "Sixth. That at the time of the conveyance from said Hulin to the plaintiffs * * * said Hulin was not in possession of the triangular piece of land mentioned in the complaint, but the same was in the possession of the defendant and had been since the 10th day of January, 1883, and the same has never been in the possession of the plaintiffs, but has always, since said 10th day of January, 1883, remained in the possession of the defendant." And again: "Ninth. That at the time of the execution of said deed to defendant, said Hulin put defendant in possession of all that portion of said premises north of said fence, and defendant has ever since been and still is in possession of the same, and was so in possession of said premises at the time of the execution of said deed to the plaintiffs."

It appears to us that upon these findings the conclusion of the trial court cannot be sustained. As we have seen, the fence formed the northern boundary of the garden lot. One of the reservations embraced in the deed was of the garden lot, and if, as found by the trial court, the grantor Hulin, at the time of delivering the deed to the defendant, put him into possession of all of the premises north of the fence, it would seem to indicate that the reservation of the garden lot expressed the intent of the parties, and that the putting of the defendant into possession of all of the lot north of the fence became a practical location of the boundary line between them.

In the record before us there appears to be some misapprehension on the part of the court below as to the competency of parol evidence. We quite agree with the learned General Term that the declarations of a grantor before the execution of a deed tending to establish a boundary other than that made

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by the deed are not competent. That the effect of such testimony might accomplish a conveyance of land by parol in contravention of the Statute of Frauds. We will go even farther and say that where, in the description of premises in a deed, courses, distances and monuments are given, the premises must be located according to the deed, and all parol evidence of the declarations and acts of the parties of an intended different location is inadmissible as contradicting or varying the deed. But there is another rule to which we must call attention, and that is, that where the description contained in the deed is so vague, obscure or conflicting as to leave the intent of the parties uncertain, the declarations and acts of the parties may be shown by parol. (*Clark v. Wethey*, 19 Wend. 320; *Vosburgh v. Teator*, 32 N. Y. 561; *Wood v. Lafayette*, 46 id. 484; *Stout v. Woodward*, 5 Hun, 340; affirmed 71 N. Y. 590; *Donahue v. Case*, 61 id. 631.)

In the case before us we have two conflicting descriptions of the land intended to be reserved by Hulin from the defendant's deed. One reserves 137 feet from the north line of Harrison's land upon the canal. This, as we have shown, would extend 19½ feet north of the fence onto the lot previously occupied in connection with the hotel buildings, and the line so formed would pass diagonally through a barn or shed standing next to the fence used in connection with the hotel. The other description contained in the deed reserved only that part which was used by the grantor for a garden, which was bounded on the north by the fence to which allusion has already been made. The question is, which of these lines was intended. The fence is not mentioned in the deed. Had it been, it would perhaps have become a monument or object which would control the determination of the question, for the rule is that courses and distances ordinarily must yield to natural or artificial monuments or objects. But the word "garden" is used, and it appears that the garden is bounded by the fence, and whilst it may not indicate a definite line as accurately as would a fixed monument, it appears to us, taken in connection with the other facts, to be sufficient to raise a

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question of fact as to the intent of the parties, and that the declarations and acts of the grantor at the time of delivering the deed to the defendant, in reference to the delivery to him of the possession of the land, may be properly received in evidence.

The judgment of the General Term and that of the trial court should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed. _____

180	6
159	199
180	6
162	118

HENRY JOY, Respondent, v. JOHN F. DIEFENDORF, Appellant.

Where, in an action upon a promissory note brought by a transferee, the maker establishes that the note was obtained from him through fraud, the burden rests upon plaintiff to establish that he is a *bona fide* purchaser.

Where plaintiff seeks to establish this by his own testimony, although it is undisputed, the credibility of his testimony is for the jury to determine, and so, a direction of a verdict in his favor is error.

The rule which renders void as usurious a note in the hands of a third party who purchased it at a discount greater than the legal rate of interest, applies only to notes that had no inception between the parties thereto and which were not intended to be available until discounted.

Where, therefore, a note was executed and delivered to the payee with intent to represent an existing obligation, it is valid in the hands of a *bona fide* purchaser at a discount greater than the legal rate of interest, although it was obtained by fraud from the maker.

(Argued October 7, 1891; decided October 20, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 10, 1889, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Z. S. Westbrook for appellant. The note in question if given for a patent-right would be absolutely void under chapter 65,

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Laws of New York for 1877, in not having the words "given for a patent-right" written or printed upon the face thereof, above the signature as thereby required, in the hands of any purchaser who is not a *bona fide* holder. (Laws of 1877, chap. 65; *Spring v. Quance*, 3 How. Pr. [N. S.] 65; *Palmer v. Minor*, 8 Hun, 342; *Herdic v. Roessler*, 109 N. Y. 127.) The court at the trial erred in holding that as a matter of law the plaintiff was a *bona fide* holder of the note, and entitled, therefore, to recover upon the same. (1 Rand. on Neg. Paper, 12, § 14; 1 Pars. on Cont. 254; *Stalker v. McDonald*, 6 Hill, 93.) The question whether plaintiff was a *bona fide* holder should have been submitted to the jury. (*Vosburgh v. Diefendorf*, 119 N. Y. 357; *C. N. Bank v. Diefendorf*, 123 id. 191; *F. N. Bank v. Green*, 43 id. 298; *F. & C. N. Bank v. Noxon*, 45 id. 762; *Grocers' Bank v. Penfield*, 69 id. 502; *Comstock v. Hier*, 73 id. 273, 274; *D. S. M. Co. v. Best*, 105 id. 59; *Seymour v. McKinstry*, 106 id. 240; *Tinsdale v. Murray*, 9 Daly, 446; *Benton v. Martin*, 52 N. Y. 570; *Bookstaver v. Jayne*, 60 id. 146; Daniels on Neg. Inst. §§ 746, 777, 795, 796, 799, 801; *Baker v. Bliss*, 39 N. Y. 70; *Nutter v. Stover*, 48 Me. 163; *Hamilton v. Marks*, 52 Mo. 78; *Gould v. Stevens*, 43 Vt. 125; 1 Edwards on Bills and Notes, § 517; 1 Pars. on Bills, 260; Story on Prom. Notes, § 197; 2 Rand. on Comm. Paper, 693.) The amount of the shave on purchase of a note and the inadequacy or unreasonableness of price paid therefor is evidence of bad faith, to be submitted to the jury. (2 Rand. on Comm. Paper, §§ 991, 992; *Lay v. Wissman*, 36 Iowa, 305; *De Witt v. Perkins*, 22 Wis. 474; *Bailey v. Smith*, 14 Ohio St. 396; *Herth v. M. N. Bank*, 34 Ind. 380; *Gould v. Stevens*, 43 Vt. 125; *C. N. Bank v. Diefendorf*, 123 N. Y. 191; *Ormsbee v. How*, 54 Vt. 182.) Plaintiff's good faith rested entirely upon his own interested testimony. His credibility was clearly a question for the jury. (*Vosburgh v. Diefendorf*, 119 N. Y. 357; *C. N. Bank v. Diefendorf*, 123 id. 191, 200; *Elwood v. W. U. T. Co.*, 45 id. 549, 554; *Kavanagh v. Wilson*, 70 id. 177, 179; *Sheridan v. Mayor, etc.*, 8 Hun, 424; *McNulty v. Hurd*, 86 N. Y. 547,

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553, 554; *Gildersleeve v. Landon*, 73 id. 609, 610; *Dean v. Van Nostrand*, 23 Wkly. Dig. 97; *Longyear v. U. S. L. Ins. Co.*, 20 id. 165; *Honegger v. Wettstein*, 94 N. Y. 252, 261; *Karney v. Mayor, etc.*, 92 id. 617; *Cross v. Cross*, 108 id. 628; *Becker v. Roch*, 104 id. 394, 404; *People ex rel. Steed v. French*, 17 N. Y. S. R. 100; *Moody v. Prell*, 2 Abb. [N. C.] 274; *Stillwell v. Carpenter*, Id. 238, note; *Posthoff v. Schreiber*, 47 Hun, 593, 598; *Hodge v. City of Buffalo*, 1 Abb. [N. C.] 356; *Nicholson v. Connor*, 8 Daly, 212.) The note in question is void for usury, it never having had a valid inception before the transfer thereof to plaintiff at an unlawful rate of interest. (*Hall v. Wilson*, 16 Barb. 548, 550; *Wardell v. Howell*, 9 Wend. 170; *Catlin v. Gunter*, 11 N. Y. 368; *Eastman v. Shaw*, 65 id. 522; *Sweet v. Chapman*, 7 Hun, 576; *C. N. Bank v. Diefendorf*, 123 N. Y. 191, 198.) Giving *prima facie* evidence of a fact does not shift the burden of proof. (*Heinman v. Heard*, 62 N. Y. 448.) The failure of plaintiff to produce the witnesses Henderson and Van Valkenburgh, as witnesses in his behalf, were strong circumstances against him. (*Brooks v. Stern*, 6 Hun, 516; 15 J. & S. 436; *Bleecker v. Johnston*, 69 N. Y. 309.)

Henry Bacon for respondent. The fact that this note, which was given in part for the purchase-price of a patent right, did not have written upon its face the statement that it was given for a patent right as required by the Laws of 1887, did not render the note invalid in the hands of the plaintiff as a *bona fide* holder for value. (*Herdic v. Roessler*, 109 N. Y. 127.) Plaintiff is entitled to recover because he showed that he was a purchaser in good faith for value and before maturity, even if the note was fraudulently diverted by Henderson. (*Moore v. Ryder*, 65 N. Y. 438; *Saybell v. N. C. Bank*, 54 id. 288; *Dalrymple v. Hillenbrand*, 62 id. 5; *Cowing v. Altman*, 71 id. 435; *Chapman v. Rose*, 56 id. 137.) The court properly directed the verdict for the plaintiff under the well-settled rule that unless the evidence makes out a case upon which a jury would be authorized to find fraud or bad faith upon the

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part of the purchaser of commercial paper, it is the duty of the court to direct the verdict in his favor. (*Welch v. Sage*, 47 N. Y. 143, 153; *Kelly v. Burroughs*, 33 Hun, 349; 102 N. Y. 93; *Cowing v. Altman*, 71 id. 435.)

BROWN, J. This action was brought to recover the amount claimed to be due upon a promissory note made by the defendant whereby he promised to pay to H. D. Henderson or bearer one thousand dollars with interest six months after date at the Spraker National Bank at Canajoharie, and by said Henderson transferred for value to the plaintiff within a few days after its execution.

The principal defense relied upon to defeat a recovery was that the plaintiff was not a *bona fide* holder of the note.

The trial court directed a verdict for the plaintiff, thus disposing of this question as one of law, and refused a request by the defendant to submit it to the jury.

The evidence given upon the part of the defendant was sufficient to warrant the conclusion that the note had been obtained from him through a fraud practiced upon him by Henderson and Van Valkenburgh and the burden was thus cast upon the plaintiff to show that he was a *bona fide* purchaser. (*Vosburgh v. Diefendorf*, 119 N. Y. 357, and cases cited.)

This burden the plaintiff met by his own evidence as to the circumstances attending the purchase and his knowledge of the party from whom he obtained it, and the credibility of his testimony was for the jury to determine.

That question was decided in *Canajoharie Natl. Bank v. Diefendorf* (123 N. Y. 191). That case was upon a note obtained by the same parties from this defendant and grew out of the same transaction as the note in suit and was transferred to the bank by Henderson.

The question of the good faith of the bank's purchase depended entirely upon the evidence of its cashier, and it was held that his relation to the bank and his interest in the transaction brought him within the rule that the credibility of a

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party or an interested witness is a question for the jury to determine. No distinction in this respect is apparent between that case and the one under consideration. The court, therefore, erred in refusing to submit the case to the jury and the judgment must be reversed.

It was also claimed that the note was void for usury in that before it had any legal inception, it was transferred to the plaintiff at a discount much greater than the legal interest.

The question of usury was not raised at the trial in the Canajoharie bank case, and there was no ruling which presented it for consideration in this court, and we cannot, therefore, assume that the court decided it, although it was incidentally referred to in the opinion.

We think that defense is not available in this case.

The substance of the defendant's evidence was that Henderson and Van Valkenburgh represented that they, with one Ackley, were engaged in business as partners; that they could buy out Ackley for \$8,000; and by these and other representations induced defendant to agree to become a member of the firm in Ackley's place and to execute and deliver his notes to them for \$8,000.

That the notes were to be held by the firm and were not to be sold or disposed of and were to be paid out of the proceeds of the business.

Although these representations were false, it cannot be said that the notes had no legal inception.

They were intended to represent an obligation.

The rule which renders void a note in the hands of a third party, who has purchased at a discount greater than the legal interest applies to instruments that have no inception between the parties or which are not intended to be available until discounted. This note in suit does not fall within that rule.

The judgment must be reversed and a new trial granted, costs to abide the event.

All concur, except POTTER, J., not sitting.

Judgment reversed.

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MICHAEL LEVY et al., Respondents, v. EMANUEL NEWMAN,
Appellant.

Statutes providing the procedure for assessing and collecting taxes, for the sale of land for their non-payment, and for the redemption of lands sold for unpaid taxes, are applicable to infants and persons under disabilities, unless they are excepted from the operation of the act.

The provision of the charter of the city of Brooklyn of 1873 (§ 9, tit. 8, chap. 863, Laws of 1873), providing that where lands sold for unpaid taxes belong to an infant having no guardian, no conveyance shall be executed by the registrar until at least one month after a guardian has been appointed or the disability removed, and until the expiration of the month authorizing the redemption, does not apply to the sale and redemption of land sold for taxes readjusted under the act of 1883 (Chap. 114, Laws of 1883), providing for the settlement and collection of arrearages of unpaid taxes in said city.

Accordingly *held*, where an infant owner of land, sold in pursuance of the latter act, was served personally with notice of sale and failed to redeem within the time prescribed by the act, that the right of redemption and the title of the infant was cut off.

Reported below, 50 Hun, 438.

(Argued October 8, 1891; decided October 20, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made November 12, 1888, which affirmed a judgment in favor of plaintiffs entered on the decision of the court on trial at Circuit, without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Fernando Solinger for appellant. Notwithstanding the statute apparently fully legislated upon the subject of tax sales, the absence of any provision for service upon infants and the manner in which they might be treated and what protection they should have, clearly shows that the charter provision should govern. (Laws of 1848, chap. 319; Laws of 1860, chap. 360; *Lefevre v. Lefevre*, 59 N. Y. 435; *People v. Jaehne*, 103 id. 182; *U. S. v. Tyman*, 11 Wall. 88.) The law implies

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into the statute an exception in favor of infants. (*Coy v. Coy*, 15 Minn. 119.)

Ira Leo Bamberger for respondents. A general law for the sale of delinquent lands includes lands of infants. (Burroughs on Taxation, 362; Black on Tax Titles, § 193; *Mettz v. Hipps*, 96 Penn. St. 15; *Prior v. Ryburn*, 16 Ark. 671; *Machine v. Thompson*, 17 id. 199; *Smith v. Macon*, 20 Ark. 17.) Chapter 114 of the Laws of 1883 was intended to cover the whole subject of the adjustment of taxes in the city of Brooklyn, and contains no provision, directly or indirectly, for the appointment of a guardian. (*Cromwell v. MacLean*, 123 N. Y. 485; *Heckman v. Pinkney*, 81 id. 211; *People ex rel. v. City of Brooklyn*, 69 id. 605.)

FOLLETT, Ch. J. This action was brought to recover the purchase-price of land, which September 1, 1887, the plaintiffs contracted to sell and the defendant to buy, by an executory contract to be performed October 17, 1887. The defense interposed is that the plaintiffs were unable to convey a perfect title. February 3, 1886, the registrar of arrears of the city of Brooklyn sold the lot in question to David J. Eisner (from whom the plaintiffs, through mesne conveyances, derived their title) for unpaid taxes, pursuant to chapter 114 of the Laws of 1883. At this time, three infants owned five-ninths of the land as tenants in common with several adults who owned four-ninths. The adults and infants were personally served with notice of the sale, but failed to redeem within the time prescribed by statute. Neither of the infants had a general guardian, and the defendant insists that their right of redemption has not been cut off.

By title 8 of chapter 863 of the Laws of 1873 (the late charter of the city of Brooklyn), a department of arrears was created and charged with the duty of selling property for unpaid taxes. By this title, the procedure by which sales were to be made and redemption effected was prescribed with particularity. Section 9 of this title provides :

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“SECTION 9. Whenever such registrar shall receive satisfactory information that the land so sold belongs to an idiot or insane person, for whose estate no committee shall have been appointed, or to an infant having no guardian, he shall not execute a conveyance of their lands until at least one month after he shall have legal evidence that such disability has been removed or a committee or guardian of the estate has been appointed. And until the expiration of said month, such committee or guardian may redeem such land in the same manner as hereinbefore provided.”

On the 16th of March, 1883, the taxes in arrear in this city exceeded ten millions of dollars, and on that date chapter 114, L. 1883, was passed, by which the board of assessors was authorized to determine the proportion of the taxes in arrear assessed prior to July 1, 1882, which ought to be paid. The amounts found to be equitably chargeable to each piece of property were to be a lien on the land, and a complete scheme was provided for collecting the readjusted taxes, and in case of their non-payment, for the sale of the property against which they were assessed, and for the redemption of the property sold pursuant to the act. It is not asserted and could not be successfully, that the readjusted taxes could be collected by the procedure prescribed by the charter of 1873, but they could only be by the mode provided by chapter 114, from which section 9 above quoted is omitted. This section was not repealed by the act of 1883, but by the terms of the statute, the section became wholly inapplicable to the sale and redemption of land for taxes readjusted under the statute of 1883.

The right to redeem lands sold to enforce the collection of taxes assessed against it, is purely statutory, and statutes providing the procedure for assessing and collecting taxes for the sale of land for their non-payment, and for the redemption of lands sold are applicable to infants and persons under disabilities, unless they are excepted from their operation. (*Metz v. Hipps*, 96 Penn. St. 15; *Smith v. Macon*, 20 Ark. 17; 2 Black Tax Titles [5th ed.], § 713; Cooley Tax. [2d ed.] 533, 534; Burroughs Tax. 362; Ang. Lim. [6th ed.] § 184.)

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It is a general rule that statutes limiting the time in which, and prescribing the procedure by which, rights shall be enforced, are applicable to persons under disabilities, unless expressly excepted. (*Bucklin v. Ford*, 5 Barb. 393; *Bank of the State of Alabama v. Dalton*, 9 How. [U. S.] 522; *The Sam Slick*, 2 Curtis C. C. 480; *U. S. v. Maillard*, 4 Ben. 459; *Howell v. Hair*, 15 Ala. 194; Ang. Lim. [6th ed.] § 194.)

The title of the persons owning the fee at the time of a tax sale, both infants and adults, was cut off by the sale, and by their failure to redeem within the time and in the manner provided by the statute under which the sale was made. It follows that the plaintiffs tendered to the defendant a good title, and they are entitled to recover the purchase-price.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

MARY E. HUGHES, Respondent, v. THE METROPOLITAN
ELEVATED RAILWAY COMPANY et al., Appellants.

The right of an owner of a lot, abutting on a public street in a city to use and enjoy the light, air and access afforded by the street, is an appurtenance of his lot and property, for which, if taken for purposes inconsistent with street uses, compensation must be made, and if not taken, but injured by such uses, the damages sustained may be recovered.

This right does not originate in a grant, and so its existence need not be established by conveyance in specific terms, nor by adverse possession; it arises by operation of law from contiguity, and its existence is presumed.

The use of a city street by an elevated railroad is a use inconsistent with the purposes for which such streets are designed.

The term "abutting lot" means one bounded on the side of a public street, in the bed or soil of which the owner of the lot has no title, interest or private rights, except such as are incident to a lot so situated.

It seems, the presumption existing in favor of an abutting lot owner may be rebutted by showing that the rights have been parted with in any of the modes by which incorporeal hereditaments may be transferred, surrendered or lost.

The burden of rebutting such presumption, however, is on the party who claims to have acquired such right.

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In an action to recover damages for injuries to plaintiff's property abutting on a public street in New York city, the fee of which is in the city, arising from the building and maintaining of defendants' elevated road in said street, the following facts appeared: The construction of said road was commenced in July, 1878. The premises were then owned by E., who, in December of that year, sold and conveyed them, and to his title plaintiff claimed to have succeeded in November, 1881. Defendants, upon cross-examination of one of the grantees of E., drew forth evidence to the effect that they bought and owned the lot; that the other grantees conveyed to him, and that he became the sole owner. Defendants also, for the purpose of showing a lien on the premises, introduced in evidence a mortgage thereon executed by E., and proved that he purchased it in 1878. Defendants raised no question on the trial as to plaintiff's title, and requested no finding that she had no title, or that title was in another, but excepted to a finding of title in plaintiff. *Held*, untenable; that it could not be held the finding had no evidence to sustain it.

For the purpose of rebutting the presumption that plaintiff owned the easements in the street, defendants proved that before she acquired title said easements had been interfered with substantially to the same extent as when the action was brought. They also proved that proceedings had been instituted to acquire from plaintiff the right to maintain and operate the road in front of her premises, and the court found that in such proceedings plaintiff had been duly served and brought into court, and that they were still pending. *Held*, that the defendants' evidence amounted to an admission that they occupied the street in subordination to plaintiff's right to compensation.

Also *held*, that plaintiff was entitled to recover a sum awarded for damages to the fee, as a condition of defendants being allowed to continue the structure and operation of its road.

Reported below, 25 J. & S. 379.

(Argued June 1, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 6, 1890, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was begun November 16, 1887, to recover a judgment: (1) For the damages to the rental value of No. 138 West Fifty-third street, alleged to have been occasioned by the construction and operation of the defendants' elevated railroad in the street in front of the premises; and (2) to

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restrain them from thereafter continuing their road in front of the premises.

The construction of the road was begun in this street in July, 1878; it was finished in November of that year and was put in operation in June, 1879. It does not appear who owned or was in possession of the premises when the road was begun and completed. In 1838 the city of New York acquired the title to the land of West Fifty-third street which was in that year opened as one of the public streets in the city pursuant to chapter 115, Laws of 1807, and chapter 86, Laws of 1813.

Lot No. 138 is bounded on the north by the south side of Fifty-third street and its owners have never had any title or estate in the soil of that street and no interests or private rights therein except such as are incident to lots so situated. December 31, 1878, Augusta A. Eising assumed to convey No. 138 West Fifty-third street to James R. Breen, Alfred G. Nason and George W. Hughes. In March, 1879, the plaintiff entered into possession and has since remained in possession of the premises. October 4, 1880, Breen and Nason conveyed their interest in the lot to George W. Hughes, plaintiff's husband, who, November 29, 1881, conveyed his interest in them to Fitzsimmons, who on the same day conveyed his interest to the plaintiff. Such is the paper title. The record does not disclose who assumed to own or was in possession of the lot at any time prior to December 31, 1878, the date of the deed of Augusta A. Eising.

The answer in the main is a denial upon information and belief of the allegations of the complaint and presents as affirmative defenses that on the 6th day of March, 1868, Augusta Eising executed a mortgage upon the premises to Henrich Wiener, which said mortgage is owned by Eliza Wiener. The answer further alleges that the defendants' road was constructed and operated before plaintiff owned or occupied the lot and house and while they were owned and occupied by another "and *that if any* damages were inflicted upon said premises, or if any destruction or loss of easements has been occasioned" * * * the said damage was *then* inflicted or

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said loss or destruction of easements *then* took place and that the plaintiff herein is not the owner of the cause of action for such damages. The answer also sets up the six and ten year Statutes of Limitations and that plaintiff and her predecessors in title made no objection to the construction or the running of the road. The answer also sets up that on April 14, 1888, the Metropolitan Elevated Railroad Company began proceedings to acquire by condemnation the rights appertaining to the premises and belonging to the plaintiff which were interfered with by the construction and operation of the road. The pendency of these proceedings was set up in the answer as a defense to this action. The cause was tried in December, 1888, and upon the decision rendered a judgment was entered June 7, 1889, awarding (1) \$3,500 damages for the injury caused to the rental value of the premises between November 16, 1887 (the date when the action was begun), and the date of the decision ; and (2) a perpetual injunction restraining the continuance of the road in front of the premises unless the defendants paid to the plaintiff \$9,000 found to be the value of the rights appurtenant to the lot which had been interfered with by the road.

Further facts appear in the opinion.

John F. Dillon, Julien T. Davies and Brainard Tolles for appellants. Plaintiff failed to prove title, as against the defendants, either to the abutting property in question or to any easements in Fifty-third street. (*Mitchell v. M. E. R. Co.*, 56 Hun, 543 ; *Gardner v. Heart*, 1 N. Y. 528 ; *Churchill v. Onderdonk*, 59 id. 134 ; *Miller v. L. I. R. Co.*, 71 id. 380 ; *Mayor, etc., v. Carleton*, 113 id. 284 ; *Carleton v. Darcy*, 90 id. 566 ; *Lane v. Gould*, 10 Barb. 255 ; *Clute v. Vris*, 31 id. 515 ; *Dominy v. Miller*, 33 id. 389 ; 2 Washb. on Real Prop. § 284 ; Washb. on Easements, chap. 5, § 7 ; *Cartwright v. Maplesden*, 53 N. Y. 652 ; *S. V. O. Asylum v. City of Troy*, 76 id. 113 ; *Dyer v. Sandford*, 7 Metc. 395 ; *Winter v. Brockwell*, 8 East. 308 ; *Morse v. Copeland*, 2 Gray, 302 ; *Hoch v. M. E. R. Co.*, 37 N. Y. S. R. 200 ; Laws of 1850, chap. 140,

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§ 14; Code Civ. Pro. § 1502.) The plaintiff failed to show herself entitled to substantial damages or to an equitable remedy. (*Hart v. Laury*, 121 N. Y. 636, 643; *Genet v. D. & H. C. Co.*, 34 N. Y. S. R. 247; *Jeffers v. Jeffers*, 107 N. Y. 653; *Corning v. T. I. & N. Co.*, 40 id. 220; *Clinton v. Myers*, 46 id. 521; *Morgan v. Binghamton*, 102 id. 500; *Troy, etc., R. Co. v. H. T., etc., R. Co.*, 86 id. 106, 123, 126; *People v. M. T. Co.*, 31 Hun, 596; *Drake v. H. R. R. Co.*, 7 Barb. 508; *Jerome v. Ross*, 7 Johns. Ch. 315; *Livingston v. Livingston*, 6 id. 497; *Sargeant v. George*, 56 Vt. 627; *Blake v. The City*, 26 Barb. 301; *Attorney-General v. Nichols*, 16 Ves. 342; *Henderson v. N. Y. C. & H. R. R. Co.*, 78 N. Y. 423, 730; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 98, 118; *Story v. N. Y. E. R. Co.*, 90 id. 122, 148, 171, 179; *Pond v. M. E. R. Co.*, 112 id. 189, 190; *Tallman v. M. E. R. Co.*, 121 id. 119, 125; *Abendroth v. M. R. Co.*, 122 id. 1, 17; *N. Y. E. R. Co. v. F. N. Bank*, 135 U. S. 432, 440; *Taylor v. M. E. R. Co.*, 18 J. & S. 311, 322, 328; *Mattlage v. N. Y. E. R. Co.*, 11 N. Y. Supp. 482; *Brush v. M. E. R. Co.*, 26 Abb. [N. C.] 73; *Gray v. N. Y. E. R. Co.*, 12 N. Y. Supp. 542; *Welsh v. N. Y. E. R. Co.*, Id. 545; *Purdy v. M. R. Co.*, 36 N. Y. S. R. 43; *Newman v. M. E. R. Co.*, 118 N. Y. 618; *T. & B. R. Co. v. Lee*, 13 Barb. 169; *In re N. Y., L. & W. R. R. Co.*, 27 Hun, 151; *In re N. Y., W. S. & B. R. R. Co.*, 29 id. 609; *In re C. & S. V. R. R. Co.*, 56 Barb. 456; *In re N. Y. C. & H. R. R. Co. v. Judge*, 15 Hun, 63; *In re Furman Street*, 17 Wend. 649; Cooley on Const. Lim. 565; Lewis on Em. Domain, § 478; *S. A. R. Co. v. M. E. R. Co.*, 56 Hun, 122; *P., etc., R. Co. v. Vance*, 115 Penn. St. 325; *Lawrence v. Boston*, 119 Mass. 126; *Moulton v. N. W. Co.*, 137 id. 163; *Harrison v. I. M. R. Co.*, 36 Ia. 323; *Boom Co. v. Patterson*, 98 U. S. 403; *C. B. R. Co. v. Andrews*, 26 Kan. 702; *Like v. McKinstry*, 41 Barb. 186; 4 Keyes, 397; *Dodge v. Colby*, 108 N. Y. 445; *Linden v. Graham*, 1 Duer, 670; *Mahon v. N. Y. C. R. R. Co.*, 24 N. Y. 658; *Ottenot v. N. Y., L. & W. R. R. Co.*, 119 id. 603; *N. Y. N. E. Bank v.*

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M. E. R. Co., 108 N. Y. 660; *Spencer v. P. P. R. Co.*, 23 W. Va. 406; *Stetson v. C., etc., R. Co.*, 75 Ill. 74; *Rigney v. City of Chicago*, 102 id. 64; *C., etc., R. R. Co. v. Loeb*, 118 Ill. 203; *C., etc., R. R. Co. v. Maher*, 91 id. 312; *R. R. Co. v. Duncan*, 111 Penn. St. 352; *O'Brien v. Penn. R. Co.*, 119 id. 184; *R. R. Co. v. McCutcheon*, 7 Atl. Rep. 146; *Denver, etc., R. Co. v. Domke*, 11 Col. 247.) The right of the owner at the time when the elevated railroad was constructed to compensation for the depreciation in value thereby caused, is established by the *Henderson* case, is consistent with legal principles and it is not inconsistent with the doctrines of the *Uline* and *Pond* cases, or any other cases in this court. (*Peck v. Goodberlett*, 109 N. Y. 180; 112 id. 189; *Jesser v. Gifford*, 4 Burr. 214¹; *Moore v. Hall*, L. R. [3 Q. B. Div.] 178; *Goddard on Easements*, 404; *Code Civ. Pro.* § 1665; *Porter v. M. E. R. Co.*, 120 N. Y. 289; *King v. Mayor, etc.*, 102 id. 171; *McFadden v. Johnson*, 72 Penn. St. 335; *Sargent v. Machias*, 65 Me. 591; *Allyn v. F. R. R. Co.*, 4 R. I. 457; *Ten Brooke v. Jahke*, 77 Penn. St. 392; *Turnpike Road v. Brosi*, 22 id. 29; *Dobbins v. Brown*, 12 id. 75; *Simmerman v. Union Canal Co.*, 1 W. & S. 346; *Schuylkill Co. v. Decker*, 2 id. 34; *McLendon v. A. R. R. Co.*, 54 Ga. 293; *Pomeroy v. C. R. R. Co.*, 25 Wis. 641; *Verdier v. P. R. R. Co.*, 15 S. C. 476; *I. R. Co. v. Allen*, 100 Ind. 409; *G. R. R. Co. v. Pfeuffer*, 56 Tex. 66; *M. R. R. Co. v. Strange*, 63 Wis. 178; *Caldwell v. Bank*, 20 Ind. 294.)

Edwin M. Felt for respondent. The objection to the question to the expert witness Guthrie, "What, in your opinion, would be the fair market value of these premises in case the defendants' structure and operation of its road was not in Fifty-third street," was properly overruled. (*McGean v. M. R. Co.*, 117 N. Y. 219.) The court properly denied defendants' motion to dismiss the complaint, made at the close of plaintiff's case, on the ground of plaintiff's alleged *laches* and acquiescence in defendants' act. (*Platt v. Platt*, 58 N. Y. 646; *Powers v. M. R. Co.*, 120 id. 182; *Abendroth v. M. R. Co.*, 122 id. 1;

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Ormsby v. V. C. Co., 56 id. 623; *Menendez v. Holt*, 128 U. S. 523; *Campbell v. Seaman*, 63 N. Y. 582; *Chapman v. City of Rochester*, 110 id. 273; *Ode v. M. R. Co.*, 56 Hun, 199; *Wiseman v. Lucksengir*, 84 N. Y. 32.) The fact that plaintiff took title to the premises in question after the defendants erected their structure and commenced the operation of their road, forms no ground of objection to her right to maintain this action or recover the damages her property has sustained since she became its owner in November, 1881. (*Casler v. Shipman*, 35 N. Y. 553; *Dean v. M. E. R. Co.*, 119 id. 550; *Story v. N. Y. E. R. Co.*, 90 id. 160; *Shepard v. M. R. Co.*, 117 id. 432; *Pond v. M. E. R. Co.*, 112 id. 188; *Abendroth v. M. R. Co.*, 122 id. 11.) The amounts awarded by the court below for permanent and temporary damage were reasonable and fully sustained by the testimony, and the same having been upheld by the General Term, will not be disturbed by this court. (Code Civ. Pro. § 1337; *People v. French*, 123 N. Y. 636; *Flack v. Vil. of Green Island*, 122 id. 107; *Tallman v. M. E. R. Co.*, 121 id. 119; *Broistedt v. S. R. R. Co.*, 55 id. 220; *Corning v. T. I. & N. Co.*, 40 id. 191; *Campbell v. Seaman*, 63 id. 568; *Shepard v. M. R. Co.*, 117 id. 442; *Mitchell v. M. E. R. Co.*, 56 Hun, 543; *Weifelman v. M. R. Co.*, 32 N. Y. S. R. 682.) It was not necessary for respondent to show actual possession in her grantor, Augusta Eising, or in any of the subsequent grantors, the law presumed it. (*Doe v. Butler*, 3 Wend. 149; *Jackson v. Sharp*, 9 Johns. 263; *Jackson v. Waters*, 12 id. 365; *Jackson v. Thomas*, 17 id. 293; *LaFlambois v. Jackson*, 8 Cow. 587; *Hurlbert v. Trinity Church*, 24 Wend. 587; *Wimer v. Mayor, etc.*, 5 J. & S. 171.)

Charles Gibson Bennett for owners of property similarly situated. The fact that the plaintiff acquired title to her premises after the construction of the railway is no bar to the relief awarded her by the judgment. (*Uline v. N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98; *Corning v. T. I. & N. Factory*, 40 id. 191; *Broistedt v. S. S. R. R. Co.*, 55 id. 220; *Brady v. Weeks*, 3 Barb. 151; *Campbell v. Seaman*, 63 N.

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Y. 568; *Bowie v. Brahe*, 3 Duer. 35; *Pond v. M. E. R. Co.*, 112 N. Y. 186; *Griswold v. M. E. R. Co.*, 122 id. 102.)

G. Willett Van Nest for owners of property similarly situated. The rights of a plaintiff acquiring title to real estate by the ordinary form of conveyance after the construction of an elevated railway, are the same as those of his vendor at the time of purchase. (*Lahr v. M. E. R. Co.*, 104 N. Y. 268; *Story v. N. Y. E. R. Co.*, 90 id. 145; *Hills v. Miller*, 3 Paige, 254; *Taylor v. Hopper*, 62 N. Y. 649; *Arnold v. H. R. R. Co.*, 55 id. 661; *Griswold v. M. E. R. Co.*, 122 id. 102; *Shepard v. M. R. Co.*, 117 id. 442; *Tallman v. M. E. R. Co.*, 121 id. 119.) The rule of damages in these actions is the diminished rental value for six years prior to the bringing of the action, and in providing for an alternative to the injunction, the courts adopt the same rule as is adopted in condemnation proceedings, the only legal method of acquiring the easements, viz.: the diminished fee value of the whole property. (Sedg. on Dam. 34; *Francis v. Schoellkopf*, 53 N. Y. 152; *Lahr v. M. E. R. Co.*, 104 id. 268; *In re Poughkeepsie*, 63 Barb. 151; *In re Boston*, 31 Hun, 461; *In re Utica*, 56 Barb. 464; *In re N. Y.*, 35 Hun, 63; *In re N. Y., W. S. & B. R. R. Co.*, 29 id. 611; *In re Prospect*, 13 id. 345; 16 id. 261; *In re N. Y., W. S. & B. R. R. Co.*, 35 id. 263; *In re N. Y., L. & W. R. R. Co.*, 27 id. 151; *In re N. Y., W. S. & B. R. R. Co.*, Id. 537; *Bangor v. McComb*, 60 Me. 290; *Buccleuch v. M. Co.*, L. R. [5 H. L.] 458; *Adden v. R. R. Co.*, 55 N. H. 413.)

Henry G. Atwater for owners of property similarly situated. An owner of property abutting on the line of the elevated road who has purchased, after the building of the road, can maintain an action for damages or compel the railroad company to offer compensation for the easements taken by the erection and operation of the road. (*Lahr Case*, 104 N. Y. 287; *Dean v. M. E. R. Co.*, 119 id. 540; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 122.)

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John Brooks Leavitt, E. W. Tyler and Eugene D. Hawkins for owners of property similarly situated. Property abutting upon the public streets in the city of New York is entitled to easements in the street of light, air, access, etc. These easements are appurtenant to the property, are annexed to the land and pass by grant of the land without any special words of conveyance. (*Pond Case*, 112 N. Y. 187; *Uline Case*, 101 id. 98; 1 R. S. 147; *Corning v. T. I. & N. Factory*, 40 id. 192.) The possession of the elevated roads is not adverse, but under license by act of legislature, which only extended to the rights of the public, and is presumed to be in subordination to the rights of abutting owners. (*Glover v. M. R. R. Co.*, 19 J. & S. 1; *Broistedt v. S. S. R. R. Co.*, 55 N. Y. 220.) Ejectment will not lie for a mere easement nor for an incorporeal hereditament. (Tyler on Ejectment [1st ed.] 41; *Child v. Chappell*, 9 N. Y. 246; Sedg. on Title, §§ 101, 102, 146, 147.) Easements always pass with the principal estate, so as to entitle the purchaser to recover for the future damage, unless there was a prior condemnation which could first subject the property to a servitude. (*Glover v. E. R. Co.*, 19 J. & S. 1, 12, 13; 2 Hilliard on Real Prop. [3d ed.] 556; *Hulleman v. Albro*, 18 N. Y. 48; *Hills v. Miller*, 3 Paige, 254; *Watson v. E. R. Co.*, 25 J. & S. 364.) The purchaser subsequent to the road is entitled to recover the fee damage. (*Broistedt v. S. S. R. R. Co.*, 59 N. Y. 220; *Foots v. M. R. Co.*, 36 N. Y. S. R. 120; 2 Hilliard on Real Prop. [3d ed.] 356; *Huttemeier v. Albro*, 18 N. Y. 51; *Porter v. N. Y. E. R. Co.*, 120 id. 289; *Mulligan v. Elias*, 12 Abb. Pr. [N. S.] 268; *N. E. Bank v. E. R. R. Co.*, 108 N. Y. 660.)

POTTER, J. There are two questions to be considered and decided upon this appeal. The first relates to the plaintiff's title to the premises described in the complaint, including the easements of access, air and light, or her right to damages in consequence of the alleged interference therewith by the structure and operation of the railroad by the defendants, and the second relates to the nature and measure of the damages the

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plaintiff may legally recover of the defendants and the mode of enforcing the judgment for any damages that may be awarded to the plaintiff.

It is quite manifest from a study of the record in this case that the question of damages formed the main contention in the court below. Still the question of title may be said to fairly arise upon this appeal and was fully discussed in the very able and elaborate brief of the appellants' counsel.

It is insisted in behalf of the appellants that the courts below erred in holding the following propositions: (1) That the plaintiff established title to the lot and to the rights in the street appurtenant to the lot; (2) That the plaintiff is entitled to compensation for the diminution (\$9,000) of the market value of the lot caused by the completion of the road before she purchased the premises and that the defendants be restrained from continuing the road unless that sum is paid.

The trial court found as facts: "First. That the plaintiff is now and has been since the 29th day of November, 1881, seized of an estate of inheritance in fee simple absolute in premises No. 138 West 53rd street in the city of New York and in all the easements and hereditaments thereunto appertaining. To this finding the defendants filed the following exception: "To so much of the first finding of fact as finds that the plaintiff is seized of an estate of inheritance in fee simple absolute in the premises there mentioned." This finding is now challenged as one "without any evidence tending to sustain it." (Code C. P. § 3.)

The question upon the record before this court is not simply whether the plaintiff had proved her title when she rested, upon the trial of the case, but whether there was sufficient evidence introduced by plaintiff or defendant or by both when the evidence was finally closed and submitted, to support the finding of title in the plaintiff made by the trial court.

Four deeds, the first from Mrs. Eising, dated December 31, 1878, by which the grantor assumed to convey the lot in fee with the appurtenances, and under which the plaintiff claims to have acquired title, were received in evidence without objec-

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tion being taken that the grantors were not shown to have had title or possession of the subject of their grant at the date when they assumed to convey. Indeed none of the evidence, written, or oral, relating to the plaintiff's title or possession was objected to by either of the defendants. It was proved and it remained undisputed that the plaintiff had resided on lot No. 138 since March, 1879. The learned counsel for the defendants proved by his cross-examination of George W. Hughes that he, Breen and Nason bought the lot from Eising in December, 1878, that they owned it, that Breen and Nason afterwards conveyed their two-thirds to him, and to quote the language of the witness, "I became then the sole owner of the premises." This witness, having title, conveyed the lot to Fitzsimmons November 29, 1881, who, on the same day conveyed it to the plaintiff. Besides this evidence, the defendants introduced in evidence a mortgage upon the premises described in the complaint made by Augusta Eising (one of the predecessors in the plaintiff's title) to John W. Stevens on December 31, 1878, to prove that said mortgage was a lien upon said premises. Of course it could not be a lien unless the mortgagor had some title or interest in the premises. On the same day that the mortgage was made and presumptively subsequent to the making of it, Augusta Eising gave the deed in the chain of plaintiff's title to Breen, Nason and Hughes.

The defendant proved the mortgage no doubt for the purpose of raising the question that the holder of the lien of the mortgage was a necessary party to the action.

But when this evidence was in the case it was in for any other purpose it might legitimately serve.

It served to show title in plaintiff's grantors about a month before the road was completed and several months before it was operated by the defendants or either of them. And the *defendants also proved that this* house and lot was sold by Stevens to Eising in 1868 and that Eising was the grantor of Hughes. It is true this was proved by parol, there being no objection by plaintiff to that mode of proof. It does not lie in the mouth of the defendants upon this appeal to raise any

question as to their own mode of proving facts nor to the facts proved by their method. This sale of the lot in question *to Eising, grantor of Hughes & Nason*, was ten years or so before the defendants began to construct the road. The plaintiff proved by witness John W. Stevens, without objection, that he owned the lot, built and sold the house in question in 1867 or 1868. This was some ten or eleven years before the defendants built or run the road and even before the road was chartered, which was in 1875 or 1876. This witness also testified, without objection, that he bought the lot and built the house in question and sold all his lots, including this one in question, previous to 1871.

In the face of this undisputed evidence and in the absence of any assertion during the trial or request to find that the plaintiff was without title to No. 138, or that any other person owned or claimed to own it, it cannot be held that the finding that the plaintiff had title to the lot in fee simple was without any evidence tending to sustain it.

The finding above quoted contains two independent propositions; one relating to the title to the lot and the other to the title to the street rights appertaining to the lot. The exception above quoted, which was the only one filed to this finding, relates solely to the title to the lot. But the court also found as facts: "Six. That attached to the plaintiff's premises above described and as a part thereof, was and is an easement of light, air and access over said Fifty-third street and appurtenant thereto, in front of and adjoining said premises, of which easement the plaintiff has been possessed since November 29, 1881." "Seventh. That plaintiff acquired with said premises that right to have said Fifty-third street kept open and used as a public street and highway." The defendants filed exceptions to these findings and requested the court to find the converse, which was refused, to which refusal the defendants excepted. These exceptions raise the question whether there is any evidence tending to sustain the finding that the plaintiff acquired title to the rights in the street. (*Roberts v. Tobias*, 120 N. Y. 1.)

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The right of an owner of a lot abutting on a public street in a city to use and enjoy the light, air and access afforded by the street is an appurtenance of his lot and his property for which, in case it is taken for purposes inconsistent with street uses, compensation must be made; and in case it is not taken, but is injured by such uses, the damages sustained, if any, may be recovered. The use of a street by an elevated road for carrying passengers within the city is held to be a use which is inconsistent with the purposes for which city streets are designed. (*Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 164.)

These street rights of an abutting owner are not originated by grant in terms of such incidental rights and their existence need not be established by conveyances in specific terms conveying such right, for there are none; nor by adverse possession by an abutting owner, for the right is incapable of such possession as against the city. (*Driggs v. Phillips*, 103 N. Y. 77; *Elliott R. & S.* 665.) The private rights appurtenant to abutting lots arise by operation of law from contiguity, like rights for the adjacent and subjacent support of land, and their existence is presumed. (*Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 164, 185.) To prevent a misapplication of this rule it will be well to define the term "abutting lot." It denotes a lot bounded on the side of a public street, in the bed or soil of which the owner of the lot has no title, estate, interest or private rights except such as are incident to a lot so situated. The presumption existing in favor of the abutting lot may be rebutted by showing that the rights have been parted with in any of the modes by which incorporeal hereditaments may be transferred, surrendered or lost. The burden of rebutting the presumption is on him who claims to have acquired such right. (*Haight v. Price*, 21 N. Y. 241; *Wash. on Eas.* [2d ed.] 221, 283.) To rebut this presumption, the defendant proved that, for three years before the plaintiff acquired title to the lot, the light, air and access from the street had been continuously interrupted by the elevated road in the same manner and substantially to the same extent as it was when the action was begun. They also proved that the Metropolitan Railway Com-

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pany had begun proceedings, which were then pending, to acquire from the plaintiff by condemnation the right, as against this lot, to maintain and operate the elevated road in front of these premises. In the petition filed, which was served on the plaintiff, the right sought to be acquired by condemnation is thus described: "Also so much of the privilege, easement or other interest in said 53d street, as is interfered with by the construction and maintenance of the elevated road of the petitioner herein, belonging to or claimed by Mary E. Hughes and Henry Wiener, or appurtenant to the lot and premises known as number 138 West Fifty-third street, and bounded and described as follows * * * being the same premises conveyed to said Mary E. Hughes by a deed of Thomas Fitzsimmons, dated the 29th day of November, 1881; * * * that your petitioner, upon information and belief, has not been able to acquire title to the aforesaid lands, tenements, hereditaments and appurtenances." The petition was signed by the Metropolitan Elevated Railway Company and verified by the assistant secretary and treasurer of both corporations, and was introduced in evidence in behalf of both defendants. Under this state of the evidence, it cannot be held that there is none tending to sustain the finding that the plaintiff owns the street rights.

The petition also set forth that the defendants had been unable to agree upon a price for the purchase of these easements from the owner of them for the reason that the owner would not sell them to the defendants for a reasonable price. The defendants set forth fully these proceedings and their pendency in a court having jurisdiction to transfer the title to these easements to the defendants upon payment or deposit of the compensation to be awarded to the plaintiff for the deprivation of them.

The trial court found as a fact that such proceedings had been taken by the defendant; that the plaintiff had been duly served and brought into court in the proceeding, and that the proceeding was pending at the time of the trial of this action.

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This, it seems to me, is a very clear admission upon the part of the defendants that they did not own these easements, or have the right to interfere with their use or enjoyment by the owner; for it is not usual or reasonable that either individuals or corporations should take legal proceedings to compel a sale to them of property, and the payment of an award by them for property they already own, and justifies the remark of the court in its opinion in *Watson v. Met. E. R. Co.* (29 N. Y. S. R. 513): "This is an admission that the railroad holds their position in front of the plaintiff's premises in subordination to the right of plaintiff to compensation."

The real and substantial contention in this case was whether the plaintiff was entitled to recover the nine thousand dollars awarded to the plaintiff for the damages to the fee of the premises as a condition of defendants being allowed to continue the structure and the operation of the railroad.

The injury from which this species of damage arises was commenced when the defendants began to erect the structure, and has been continued and increased by subsequent use of the easements by the defendants. There is no occasion for any further discussion of the grantee's right to recover the permanent or fee damages from the time of the erection of the structure and the operation of the road to the time of the trial of this action. This court has recently affirmed such right in the case of *Pappenheim v. Met. E. R. Co.* (128 N. Y. 435), in a very able and exhaustive opinion by Judge PECKHAM, in which all the members of the court concurred. The action in that case was the same in form, brought for the same relief, and involved the same questions as the case under consideration.

The appellants' counsel have not discussed any exceptions to the rulings in relation to the reception or rejection of evidence, and I do not think any of them require consideration.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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GEORGE H. TILDEN, Respondent, v. ANDREW H. GREEN et al.,
as Executors, etc., et al., Appellants.

It seems, that a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is to be and is called into being within the time allowed for the vesting of future estates.

A certain designated beneficiary is essential to the creation of a valid testamentary trust, and a trust without a beneficiary who can claim its enforcement is void.

The objection is not obviated by the creation of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain the object or objects of the power.

So also, while under the Statute of Powers there may be a power of selection or exclusion with regard to the designated objects, the power of selection must be so defined that there are persons who can come into court and say they are embraced within the class, and demand the enforcement of the power.

The English doctrine of *cy pres*, which upholds gifts for charitable purposes when no beneficiary is named, has no place in the jurisprudence of this state.

The rule that where several trusts are created by a will, which are independent of and separable from each other, and each complete in itself, some of which are lawful and others unlawful, the illegal trusts may be cut off and the legal ones permitted to stand, can be applied only in aid and assistance of the manifest intent of the testator and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property.

When, therefore, the trusts are so connected as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion were retained and others rejected, or if manifest injustice would result from such rejection to the beneficiaries, or some of them, then all the trusts must be construed together and all must be held illegal.

While, in the construction of a will, the court must so construe its provisions as to effectuate the general intent of the testator as expressed in the whole instrument, and while for this purpose words and phrases may be transposed and its provisions read in an order different from that in which they appear in the instrument, and provisions may be inserted or left out if necessary, this can only be done in aid of the testator's intent and purpose and not to devise a new scheme or to make a new will.

The will of T. gave his residuary estate to his executors as trustees, and to their successors in the trust thereby created, "to have and to hold the same

180	29
140	48
130	29
147	109
180	29
154	212
180	29
161	187
161	140

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* * * during a period not exceeding two lives in being," which were named and "to apply the same and the proceeds thereof to the objects and purposes mentioned" in the will. Those objects and purposes were specified in a clause by which said trustees were requested to procure the incorporation of an institution "with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational purposes" as they should designate. In case such institution was incorporated during the life-time of the survivor of the two lives specified, the trustees were authorized to convey and apply to its use said residuary estate, "or so much thereof as they may deem expedient." In case the institution should not be incorporated during the period limited, "or if for any cause or reason" said trustees "shall deem it inexpedient" to so convey or apply said residue, "or any part thereof," they were authorized to apply the whole or such portion thereof as was not so applied "to such charitable educational purposes" as in their judgment would render it "most widely and substantially beneficial to mankind." In an action brought to obtain a construction of the will, *held* (BRADLEY, POTTER and VANN, JJ., dissenting), that the trust so sought to be created was invalid because of indefiniteness and uncertainty in its objects and purposes, and because it substitutes for the will of the testator that of the trustees and makes that controlling in the disposition of the trust fund; that the power conferred upon the trustees was imperative but not valid because not enforceable at the suit of any beneficiary; that the clauses in question could not be upheld as constituting primarily a separate trust or power in trust for the benefit of the institution, with an alternative ulterior provision to be effectual only in case the executors deemed it inexpedient to apply the residue to the corporation; that there was but a single indivisible scheme, *i. e.*, a gift to charitable uses, with a suggestion of or an expression of a preference for the institution as an instrument to execute the donor's purpose, leaving the choice to the executors; no preferential right to the estate, or any part of it being conferred upon the institution.

The executors caused an institution to be incorporated and organized as desired by the will, and conveyed to it the residuary estate. *Held*, that this had no bearing upon the question as to the validity of the provision, and did not affect the rights of the heirs and next of kin.

Inglis v. Trustees, etc., Sailors' Snug Harbour (3 Pet. 99); *Burrill v. Boardman* (43 N. Y. 254), distinguished.

Reported below, 54 Hun, 231.

(Argued June 2, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department entered upon an order

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made November 19, 1890, which modified, and affirmed as modified, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

James C. Carter for appellants. This case is that of a gift, not to charitable objects, or purposes, or classes of persons, natural or artificial, but to one artificial person, a corporate body, named the "Tilden Trust," fully competent by its charter to take the bequest. The validity of such a disposition of property is not open to debate. Every question which can reasonably be made concerning it, has been determined by this court, in favor of the disposition. (*Burrill v. Boardman*, 43 N. Y. 254; *Schettler v. Smith*, 41 id. 328; *Manice v. Manice*, 43 id. 303; *Savage v. Burnham*, 17 id. 561; *Kennedy v. Noy*, 105 id. 134; *Adams v. Perry*, 43 id. 487; *Selden v. Vermilyea*, 1 Barb. 58.) It is insisted that an exercise of discretion by the executors in favor of the Tilden Trust, was a condition precedent to the vesting of the gift; and, consequently, that until that discretion was exercised the Tilden Trust could not procure a judicial decree enforcing the gift, and the gift was thus rendered void. This is untenable. (1 R. S. §§ 73, 74; *Hartnell v. Wendell*, 60 N. Y. 849; *Beekman v. Bonsor*, 23 id. 298; *Powers v. Cassidy*, 79 id. 602; *Perry on Trusts*, § 248; *Holmes v. Mead*, 52 N. Y. 332.) The title of the Tilden Trust to the gift vested immediately upon the granting of the charter, subject, however, to the condition subsequent that it might be defeated by the conclusion of the executors that it was inexpedient to convey anything to that body, or the amount of the provision cut down by their conclusion that it would be inexpedient to convey the whole residue. (*Brown v. Higgs*, 5 Ves. 495; *Jarman on Wills*, 683; 2 *Williams on Ex.* 1105, 1132; *Crozier v. Bray*, 120 N. Y. 366; 2 *Redf. on Wills*, 627; *Hill on Trustees*, 490-492; *Wainwright v. Waterman*, 1 Ves. 311; *Keates v. Burton*, 14 id. 434; *French v. Davidson*, 3 Madd. 396; *Lansing v. Sheratt*, 2 Hare, 14; *Bradford v.*

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Willis, L. R. [12 Eq. Cas.] 105.) The bequest to the Tilden Trust was certain and definite, and, therefore, valid. (*Wager v. Wager*, 96 N. Y. 172; *Roe v. Vingut*, 117 id. 204; *Greene v. Greene*, 36 N. Y. S. R. 30; Perry on Trusts, § 511; *Aleyn v. Belchier*, 1 L. C. Eq. 304; *Jackson v. Sill*, 11 Johns. 201, 216; *Roseboom v. Roseboom*, 8 N. Y. 356; *Freeman v. Coit*, 96 id. 63.) The power bestowed upon the executors to make endowment to, or withhold it from, the Tilden Trust corporation, is a trust power, because it is for the benefit of other persons than the grantees of the power. It is, however, not an imperative one, but one expressly depending upon the will of the grantees within the meaning of section 96 of the article of the Revised Statutes upon Powers. (R. S. §§ 97, 100.) The corporation actually chartered by the legislature under the name of the "Tilden Trust" is the very corporation described by the testator, and its title to the residue is perfect. (*Pond v. Berg*, 10 Paige, 140, 152; *Chapman v. Broden*, 3 Burr, 1626; *Schettler v. Smith*, 41 N. Y. 328, 341; *Savage v. Burnham*, 17 id. 561, 576, 577; *Phillips v. Davies*, 92 id. 199; *Post v. Hoever*, 33 id. 593; Perry on Trusts, § 709; Jarman on Wills, chap. 16.) The arguments that the testator intended to convey his residue to his executors and trustees in trust, that by the Revised Statutes no trust is permitted for the purposes for which the trust was attempted to be created, and that the purposes cannot be accomplished under a power, for the reason that a power cannot exist where a trust is intended, finds no support in our law. (*Downing v. Marshall*, 23 N. Y. 336; *Selden v. Vermilyea*, 1 Barb. 58; *Brown v. Wilbur*, 8 Wend. 661; *Hotchkiss v. Elting*, 36 Barb. 44; *Fellows v. Heermans*, 4 Lans. 230; *In re McLoughlin*, 2 Brad. 107; *Fowler v. Depau*, 26 Barb. 224; *Hutchings v. Baldwin*, 7 Bosw. 236; *Martin v. Martin*, 43 Barb. 172; *Lang v. Ropke*, 5 Sandf. 363; *Everitt v. Everitt*, 29 N. Y. 39.) The precise legal description of the disposition made in favor of the Tilden Trust, is that it is an executory devise and bequest. (*Beardsley v. Hotchkiss*, 96 N. Y. 201, 213; 1 Jarman on Wills, 734.)

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The objection that the bequest is void as transcending our statutes against perpetuities is not tenable. (*Manice v. Manice*, 43 N. Y. 303; *Dubois v. Ray*, 35 id. 165.) The employment of the discretion of designated persons, whether in determining those who are, in the future, to take the property, or the amounts which they are to take, is not in the slightest degree inconsistent with the certainty required in the transfer of property. (1 Jarman on Wills, 307; 1 R. S. 734, § 99; *Powers v. Cassidy*, 79 N. Y. 602; *Pritchard v. Thompson*, 95 id. 76; *Holland v. Alcock*, 100 id. 312; Lewin on Trusts, 524-526, 536, 538-544, 693-709; Perry of Trusts, chap. 8, §§ 508-512; *Harding v. Glyn*, 3 L. C. Eq. 789, 805; 2 R. S. §§ 24-34, 58, 92, 94, 95, 96, 97, 99, 100, 103, 104; *Holmes v. Mead*, 52 N. Y. 332; *Gilman v. McArdle*, 99 id. 451; *Coleman v. Beach*, 97 id. 545; *Delaney v. McCormack*, 88 id. 174; Perry on Trusts, §§ 250, 252; *Read v. Williams*, 35 N. Y. S. R. 909.)

Daniel G. Rollins for appellants. If the testator's provision in favor of the Tilden Trust would be valid and legal standing by itself, its legality and validity are in nowise impaired by the fact that the ulterior direction of article 35 in favor of certain charitable, educational and scientific purposes is invalid and ineffectual. (*Smith v. Bell*, 6 Pet. 68; *Wager v. Wager*, 96 N. Y. 164; *Winter v. Perratt*, 6 M. & G. 359; *Sorresby v. Hollins*, 9 Mod. 221; *Atty.-Gen. v. Lonsdale*, 1 Sim. 105; *Salisbury v. Denton*, 3 K. & J. 529; *Carter v. Green*, 3 id. 591; *Lewis v. Allenby*, L. R. [10 Eq.] 668; *Wilkinson v. Barber*, 14 id. 96; *Morley v. Croxon*, L. R. [8 Ch. Div.] 156; *Atty.-Gen. v. Mill*, 3 Russ. 328; *Atty.-Gen. v. Whitchurch*, 3 Ves. 140; *Dent v. Allcroft*, 30 Beav. 335; *Curtis v. Hutton*, 14 Ves. 359; *Manice v. Manice*, 43 N. Y. 303; *Savage v. Burnham*, 17 id. 561; *Webster v. Morris*, 66 Wis. 366; *Van Schuyler v. Mulford*, 59 N. Y. 426; *Jennings v. Conboy*, 73 id. 236; *Oxley v. Lane*, 35 id. 340; *Woodgate v. Fleet*, 44 id. 1, 21; *Hawley v. James*, 5 Paige, 358, 459; *Jackson v. Phillips*, 14 Allen, 539, 556;

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Doe v. Aldridge, 4 T. R. 264; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99; *Palms v. Palms*, 13 West. Rep. 125; *Weeks v. Cornwall*, 104 N. Y. 325, 337; *Drew v. Wakefield*, 54 Me. 297; *Harrison v. Harrison*, 36 N. Y. 543; *Adams v. Perry*, 43 id. 487; *Pickering v. Shotwell*, 10 Penn. St. 23; *Dunlap v. Harrison*, 14 Grat. 251; *Darling v. Rogers*, 22 Wend. 483; *Hill v. Bowman*, 7 Leigh, 650.) The provisions for the Tilden Trust should receive precisely the same interpretation that would be accorded to them if the alternative provisions for indefinite charities formed no part of the will. And thus interpreted they are legal and valid. (*Powers v. Cassidy*, 79 N. Y. 602.) The testator's provision in favor of the Tilden Trust is not void for indefiniteness of subject, and the grant of discretion to the executors as regards the *quantum* of the estate to be applied by them to the Tilden Trust is legal and valid. (*Harnett v. Wendell*, 60 N. Y. 349; *Beekman v. Bonsor*, 23 id. 298; *Hawley v. James*, 5 Paige, 318; *Pink v. DeThinsey*, 2 Madd. 157; *Murdock v. Ward*, 8 Hun, 9; *French v. Davidson*, 3 Madd. 396; *Walker v. Walker*, 5 id. 424; *Mason v. Jones*, 4 Sandf. Ch. 623; 13 Barb. 461; *Colton v. Colton*, 127 U. S. 300; *Morton v. Southgate*, 28 Me. 41; *McLean v. McLean*, 3 Hun, 395; 62 N. Y. 627; *Steele v. Levisay*, 11 Grat. 454; *Fertham v. Turner*, 23 L. T. 345; *Bacon v. Bacon*, 55 Vt. 243; *McLean v. Freeman*, 9 Hun, 246; *Dickerman v. Dickerman*, 34 id. 585; *Kane v. Astor's Exrs.*, 9 N. Y. 113; *Thomas v. Pardee*, 12 Hun, 151; *Delany v. Delany*, L. R. [15 Ch. Div.] 55; *Eaton v. Smith*, 2 Beav. 236; *Haydel v. Hurck*, 72 Mo. 253; *Wells v. Wells*, 88 N. Y. 323; *Loring v. Marsh*, 6 Wall. 337; *Hoffman v. Van Syckel*, 12 Cent. Rep. 575; *Attenborough v. Attenborough*, 1 K. & J. 296.) Though the testator may have failed to create a valid trust in favor of the Tilden Trust within the limitations of the statutes of this state, his provision for that corporation must nevertheless be upheld as a power in trust, lawful and valid under our law, which power in trust is made expressly to depend on the will of the grantees and is, therefore, not imperative. (2 R. S. chap. 1, §§ 45, 58, 74, 76, 77, 78, 95; 1 Perry on Trusts,

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§ 253; *Lines v. Darden*, 5 Fla. 51.) The provision for the Tilden Trust is valid independently of the question whether the entire residuary estate vested in that object upon the legislative grant of the charter "in form and manner satisfactory to my (his) executors," (subject to be divested by the exercise of the power with which the executors were clothed), or whether, on the other hand, the determination of the executors on the question of the expediency of withholding all or part of the residue from the Tilden Trust was a condition precedent to the vesting of the residue, or of any portion of it, in that corporation. (*Shipman v. Rollins*, 98 N. Y. 311; *Ould v. W. Hospital*, 95 U. S. 311; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99; *Kinnaird v. Miller*, 25 Grat. 107; *Coit v. Comstock*, 51 Conn. 352; *Miller v. Chittenden*, 2 Iowa, 315; *McIntyre v. Zanesville*, 9 Ohio, 203; *Fured v. Dawson*, 10 Leigh, 147; *Russell v. Allen*, 107 U. S. 163; *Jones v. Habershane*, 107 id. 174; *Dodge v. Williams*, 46 Wis. 70; *Vidal v. Girard*, 2 How. [U. S.] 127.) It is sufficient that the testator clearly indicated by his will that upon the fulfillment, within two specified lives in being, of all the conditions upon which he limited his provisions for the Tilden Trust, that corporation should take his residuary estate and that, since his death and in the life-time of Ruby S. Tilden, all those conditions have, in fact, been fulfilled. (2 R. S. art. 1, § 10; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99; *Ould v. W. Hospital*, 95 U. S. 303; *Holmes v. Mead*, 52 N. Y. 332.) The provision for the Tilden Trust is not invalid by reason of the discretionary authority which it gives to the executors in determining the character of the scientific and educational objects to be promoted by that corporation. (*Beaumont v. Oliveira*, L. R. [4 Ch. App.] 309; U. S. R. S. 1836, 1846.) The provision for the Tilden Trust does not unlawfully suspend the power of alienation. (*Burrill v. Boardman*, 43 N. Y. 254; *Watkins v. Reynolds*, 123 id. 211; *Booth v. Baptist Church*, 37 N. Y. S. R. 79.)

George F. Comstock for appellants. The will of Samuel J. Tilden vested the fee of the estate devised to the Tilden Trust,

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as a contingent remainder, as an executory devise, and as a conditional limitation, but whether it takes the property devised as real or as personal estate has no significance. (1 R. S. art. 1, §§ 14, 15, 24, 45, 47, 48, 49; Code Civ. Pro. §§ 484, 3333; *Alcock v. Holland*, 108 N. Y. 312; *Downing v. Marshall*, 23 id. 366; *Holmes v. Mead*, 52 id. 356; *Burrill v. Boardman*, 43 id. 263; R. S. §§ 24, 25, 32, 34, 45-72; *Schettler v. Smith*, 41 N. Y. 328; *In re Bullard*, 96 id. 499; 2 Black. Comm. 263; 8 Henry, chap. 10; *Gilman v. Redington*, 24 N. Y. 9; Fearne on Remainders, 526; *Wendell v. Crandall*, 1 N. Y. 491; *Nellis v. Nellis*, 99 id. 505; Const. art. 8, § 1; 4 Kent's Comm. 9.)

✓ *Joseph H. Choate, Smith M. Weed and William V. Rowe* for respondent. The charitable scheme attempted by the will is void for indefiniteness and uncertainty, in respect both to the object and the subject. (*Van Kleeck v. Dutch Church*, 20 Wend. 471; *Van Nostrand v. Moore*, 52 N. Y. 12; *Kiah v. Grenier*, 56 id. 220.) The trust attempted to be created by the thirty-ninth article, to apply the residuary estate to the objects and purposes mentioned in the thirty-fifth article, is void by the laws of New York. Because of the absence of a beneficiary, defined by the testator, entitled to enforce its execution. The fact that the trustees are competent and will-
 V ing to execute it, and have attempted to execute it, does not validate it. (*Holland v. Alcock*, 108 N. Y. 322, 323; *Read v. Williams*, 35 id. 909, 911, 912; *In re Jarman*, L. R. [8 Ch. Div.] 584.) The existence of an intent that the heirs and next of kin should take nothing beyond specific gifts, is of no consequence. (*Van Kleeck v. Dutch Church*, 20 Wend. 469; *Haxtun v. Corse*, 2 Barb. Ch. 500; *Chamberlain v. Taylor*, 105 N. Y. 192.) The decisions of this court are conclusive against the validity of these provisions of the will. The court cannot sustain the trust attempted. (*Holland v. Alcock*, 108 N. Y. 312; *Pritchard v. Thompson*, 95 id. 76; *Read v. Williams*, 35 N. Y. S. R. 909; *In re O'Hara*, 95 N. Y. 418; *Willetts v. Willetts*, 103 id. 650; *Levy v. Levy*, 33 id. 97;

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Bascom v. Albertson, 34 id. 584; 2 Perry on Trusts, § 508; *Lawrence v. Cooke*, 104 N. Y. 630; *Phillips v. Phillips*, 112 id. 197; 2 Story's Eq. Juris. § 1070.) There can be no such optional or alternative power vested in trustees, to give to indefinite or definite objects, wholly at their discretion and election. The power or trust is thereby rendered unenforceable and consequently void. (1 Jarman on Wills, 214; *Mitford v. Reynolds*, 1 Phil. 185; *Nash v. Morley*, 5 Beav. 177; *Fowler v. Garlike*, 1 R. & M. 232; *Nichols v. Allen*, 130 Mass. 211, 212; *In re Jarman*, L. R. [8 Ch. Div.] 584, 587; *Norris v. Thompson*, 4 C. E. Green, 507; 5 id. 489; *James v. Allen*, 3 Mer. 17; *Vesey v. Janson*, 1 Sim. & Stu. 69; *Williams v. Kershaw*, 5 L. J. [N. S.] Ch. 84; 5 Cl. & Fin. 111; *Ellis v. Selby*, 1 Myl. & Cr. 286; *Kendall v. Granger*, 5 Beav. 300, 302; *Thompson v. Thompson*, 1 Colby, 398; *Chamberlain v. Stearns*, 111 Mass. 267; *Holland v. Alcock*, 108 N. Y. 323; *Morice v. Durham*, 9 Ves. 399; *Ommany v. Butcher*, T. & R. 260; *Thompson v. Shakespear*, 1 DeG., F. & J. 399; *Read v. Williams*, 36 N. Y. S. R. 911.) Under the Statute of Powers, and under general principles, the uncertainty as to the beneficiaries is fatal to its validity as a power. Even if this were not so, it is clear that such an undefined general power is in contravention of the Statute of Wills, and, therefore, void. (1 R. S. 729, § 58; *Holland v. Alcock*, 108 N. Y. 321; *Read v. Williams*, 35 N. Y. S. R. 909; *Bristol v. Bristol*, 53 Conn. 242, 254, 255; *Maught v. Getzendanner*, 65 Md. 527, 533; *Dulany v. Middleton*, 72 id. 67; *In re O'Hara*, 95 N. Y. 418.) Where the testator has plainly contrived a trust, and conveyed his property to his trustees in trust, not merely for a purpose which, however lawful, is not enumerated in the statute, but for an unlawful purpose, for a purpose prohibited by statute, or contravening a settled rule of law, or the fundamental policy of the law, it is not possible to maintain it as a power in trust. (*Garvey v. McDevitt*, 11 Hun, 409; 72 N. Y. 562.) This is not a mere discretionary power to appoint or not to appoint. (2 Perry on Trusts, § 508; *Lawrence v. Cooke*, 104 N. Y.

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638.) By treating the provisions of the will as if they were in favor of private persons instead of charities, precisely the same result is reached. (*Prichard v. Thompson*, 95 N. Y. 81; 2 Perry on Trusts, § 508; *Lawrence v. Cooke*, 104 N. Y. 638.) Article 3, of title 2, chapter 1 of 2 Revised Statutes is conclusive of the question, even apart from the foregoing considerations arising out of the Statute of Wills. (2 R. S. chap. 1, art 3, §§ 95, 96, 97, 98, 99, 100, 101; 35 N. Y. S. R. 911; 27 id. 505.) The charter of the Tilden Trust does not conform to the will. It is not the corporation contrived and intended by the testator. Therefore, even though the will should be held valid, this defendant corporation cannot take title to the property. (*Vaux's Appeal*, 109 Penn. St. 497.)

Delos McCurdy for respondent. By the thirty-fifth clause of the will, an attempt is made to create a trust to depend for its execution — for its validity or invalidity — upon the mere exercise of the will of the executors and trustees. No trust can be created or sustained in this state which depends upon the exercise by the trustee of an election whether he will or will not execute the alleged trust. The discretionary power in the trustees to give or withhold is incompatible with the existence of a valid trust. (*Holland v. Alcock*, 108 N. Y. 312, 323; *Maddison v. Andrew*, 1 Ves. 60; *Alexander v. Alexander*, 2 id. 640; *Kemp v. Kemp*, 5 id. 849; *Keats v. Burton*, 14 id. 437; 2 Sugden on Powers, 190; *Gower v. Mainwaring*, 2 Ves. 88; *Brereton v. Brereton*, Id. 88; *Potter v. Chapman*, Amb. 998; *Lee v. Young*, 2 Y. & C. 532; *Caplin's Will*, 11 Jur. [N. S.] 383; *Prendergrast v. Prendergrast*, 3 H. L. Cas. 195; *Coe's Trusts*, 4 K. & J. 199; 2 Perry on Trusts, § 510; Hill on Trustees, 101; *Morice v. Bishop of Durham*, 10 Ves. 536; *Ommaney v. Butcher*, T. & R. 270; *Gibbs v. Rumsey*, 2 V. & B. 297; *Bull v. Vardy*, 1 Ves. 270; *Levy v. Levy*, 33 N. Y. 104; *Dillaye v. Greenough*, 45 id. 445; *Power v. Cassidy*, 79 id. 602; *Prichard v. Thompson*, 95 id. 81, 82; *In re O'Hara*, Id. 418, 419.) The trust attempted to be created cannot be upheld as a trust for charity by the applica-

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tion of the law relating to charitable uses. The doctrine of charitable uses does not prevail in this state. (*Holmes v. Meade*, 52 N. Y. 232; *Yates v. Yates*, 9 Barb. 324, 341; *Ayers v. Meth. Church, etc.*, 3 Sandf. 351; *Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertson*, 34 id. 584; *Adams v. Perry*, 43 id. 487; *Holland v. Alcock*, 108 id. 312.) The devise and bequest in the thirty-fifth clause is fatally uncertain, both as to its subject and object. It vests no definite interest in specified property in any ascertained person, either natural or artificial, capable of enforcing a trust in its favor, and as it stands, and without the aid of some extraordinary power not possessed by the courts of this state, it is incapable of being carried into effect by judicial decree. (*Holland v. Alcock*, 108 N. Y. 312; *Levy v. Levy*, 33 id. 107; *Knight v. Knight*, 3 Beav. 148, 174; *Lechmere v. Lavie*, 2 M. & K. 197; *Meredith v. Heneage*, 1 Sim. 556; *Sale v. More*, Id. 534; *Eade v. Eade*, 5 Madd. 118; *Pierson v. Garnet*, 2 Bro. C. 45-230; *Sprague v. Barnard*, Id. 585; *Bland v. Bland*, 2 Cox, 349; *Urtis v. Ripon*, 5 Madd. 434; *Wilson v. Major*, 11 Ves. 205; *Knight v. Boughton*, 11 Cl. & F. 513; *Russell v. Jackson*, 10 Hare, 213; *Tibbits v. Tibbits*, 19 Ves. 664; *Flint v. Hughes*, 6 Beav. 342; Hill on Trustees [3d ed.], 116; *Gallego v. Atty.-Gen.*, 3 Leigh, 457; *Beekman v. Bonsor*, 23 N. Y. 306; *Morice v. Bishop of Durham*, 9 Ves. 400; *Sonley v. C. Co.*, 1 Bro. C. 81; *Phelps v. Pond*, 23 N. Y. 77; *Wheeler v. Smith*, 9 How. [U. S.] 55; *Rose v. Rose*, 4 Abb. Ct. App. Dec. 111; *Baptist Assn. v. Hart*, 4 Wheat. 1; *Power v. Cassidy*, 79 N. Y. 602; *Prichard v. Thompson*, 95 id. 81, 82; *Dillaye v. Greenough*, 45 id. 445; *Coxe v. Bassett*, 3 Ves. 155, 164; *Vesey v. Janson*, 1 Sim. & Stu. 69; *Ellis v. Selby*, 1 M. & C. 286; *James v. Allen*, 3 Mer. 19; *Down v. Worrall*, 1 M. & K. 561; *Nichols v. Allen*, 130 Mass. 211.) The provisions of this will cannot be upheld as an executory devise of the residuary estate to the Tilden Trust. (1 R. S. 723, §§ 7, 8, 9, 35, 41; Angell & Ames on Corp. § 184; *Porter's Case*, 1 Co. 24; *Atty.-Gen. v. Bonyer*, 3 Ves. 714; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99; *Burrell v. Board-*

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man, 43 N. Y. 254; *Shipman v. Rollins*, 98 id. 311; *Jackson v. Robins*, 16 Johns. 589; *Jackson v. Bull*, 10 id. 19; *Moffat v. Strong*, Id. 12; *Patterson v. Ellis*, 11 Wend. 289; *Tator v. Tator*, 4 Barb. 431; *Jocelyn v. Nott*, 44 Conn. 55; *Donohue v. McNichol*, 61 Penn. St. 73; *Sears v. Putnam*, 102 Mass. 5.) If the trust is invalid, the disposition of the property cannot be upheld as a power in trust under sections 58 and 59 (1 R. S. 729), because the testator intended to vest the title to his estate in his executors and trustees. (1 R. S. 727, 728, §§ 47, 49; 2 Perry on Trusts, § 475; *Selden v. Vermilye*, 3 N. Y. 535; *Rawson v. Lampman*, 5 id. 460, 461; *Wright v. Douglas*, 7 id. 570; *Downing v. Marshall*, 23 id. 379, 380; *N. Y. D. D. Co. v. Stillman*, 30 id. 193; *Brewster v. Striker*, 2 id. 30-37; *Leggett v. Perkins*, Id. 317; *Tobias v. Ketchum*, 32 id. 328, 331; *Garvey v. McDevitt*, 72 id. 562, 563; *Vernon v. Vernon*, 53 id. 358, 359; 1 R. S. 734, §§ 94-101.) If, in the thirty-fifth clause of Mr. Tilden's will, a limitation of the residuary estate had been made to take effect on two alternative conditions, one of which was too remote and the other within the prescribed legal limits, and, therefore, valid, the gift, so far as it depended on the remote condition, might be held void, but be allowed to take effect on the happening of the valid alternative one. (*Savage v. Burnham*, 17 N. Y. 561; *Post v. Hover*, 33 id. 593; *Schettler v. Smith*, 41 id. 328; *Knox v. Jones*, 47 id. 389.) There is, however, but a single limitation in the will, and it is of the general trust of the residuary estate, and it is not made to take effect upon alternative events, or upon any specified condition whatever, except the exercise of the power given to the executors and trustees. (*Kennedy v. Hoy*, 105 N. Y. 137.) The trust attempted to be created in the thirty-fifth clause of this will, so far as it relates to real estate, is not authorized or sanctioned by any provision of the statutes of this state, and is void. (1 R. S. 727, 728, 729, §§ 45, 55; *Gott v. Cook*, 7 Paige, 535; *Manice v. Manice*, 43 N. Y. 382; *Ayres v. Methodist Church*, 3 Sandf. 351; *Yates v. Yates*, 9 Barb. 324; *Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertson*, 34 id. 584; *Adams v. Perry*,

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43 id. 487; *Holmes v. Mead*, 52 id. 336.) The provisions of the thirty-fifth clause of this will fall within the restrictions of the statute prohibiting the creation of perpetuities. (*Hawley v. James*, 16 Wend. 120; *Yates v. Yates*, 9 Barb. 324; *Gott v. Cook*, 7 Paige, 540; *Boynston v. Hoyt*, 1 Den. 53; *Know v. Jones*, 47 N. Y. 389.) The subsequent incorporation of the Tilden Trust gave to it no right which it did not possess at the time of Mr. Tilden's death. (Laws of 1887, chap. 85, § 7.)

Lyman D. Brewster for respondent. The attempted trust cannot be turned into a valid power in trust. The nature and functions of the trust necessitate a title in the trustees. It is in terms imperative, and an imperative trust power, to be valid, must be enforceable. The trust in question does not come within the terms of a trust power, as defined by statute. (*Levy v. Levy*, 33 N. Y. 97-101; *Bascom v. Albertson*, 34 id. 592; *Holmes v. Mead*, 52 id. 332; *Rose v. Rose*, 4 Abb. Ct. App. Dec. 108; *Powers v. Cassidy*, 79 N. Y. 602; *Prichard v. Thompson*, 95 id. 76; *In re O'Hara*, Id. 403; *Holland v. Alcock*, 108 id. 312; *Read v. Williams*, 35 N. Y. S. R. 909; *Fosdick v. Town of Hempstead*, Id. 863; 2 Perry on Trusts, 508; Lewin on Trusts [5th ed.], 439; *Coleman v. Beach*, 97 N. Y. 545-559; *In re Bailey*, 24 Abb. [N. C.] 206; *In re Jarman*, L. R. [8 Ch. Div.] 679; *Williams v. Kershaw*, 5 L. J. [N. S.] 84; *Ellis v. Selby*, 1 M. & C. 286; *Adye v. Smith*, 44 Conn. 67; 1 R. S. 729, §§ 58, 96; *Dana v. Murray*, 122 N. Y. 604; *Van Horne v. Campbell*, 100 id. 317; *Woerz v. Rademacher*, 120 id. 64-68; *Downing v. Marshall*, 23 id. 366-382.) The general trust is not divisible, as claimed, into two wholly independent and separate trusts or parts. To isolate the first so-called alternative and make it non-imperative, changes the plan of the testator so utterly as to isolate it, and make it imperative to choose only the first object. As the priority of the Tilden Trust among the beneficiaries creates no enforceable right in its behalf, and as all the purposes of the first alternative are included in the second, the Tilden Trust is but one of the various purposes of the same class which the

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trustees are to choose from and endow as and to the extent they deem expedient. Their judgment on the expediency of the endowment of each, or either object, can only be exercised by comparing the merits of the various purposes. (*Van Kleeck v. Dutch Church*, 20 Wend. 457; *Van Nostrand v. Moore*, 52 N. Y. 22; *Kiah v. Grenier*, 56 id. 220; *Heasman v. Pierce*, L. R. [7 Ch. Div.] 275; *Dungannon v. Smith*, 12 Cl. & F. 546; Sutherland on Stat. Const. § 326; *Lawrence v. Cooke*, 104 N. Y. 632; 1 Jarman on Wills, 693; *Harrison v. Harrison*, 44 Am. Dec. 379; *Beck's Appeal*, 59 id. 718; 2 Pom. Eq. Juris. § 1016; *Amory v. Lord*, 9 N. Y. 403; *Coster v. Lorillard*, 14 Wend. 266-388; *McSorley v. McSorley*, 4 Sand. Ch. 414; *Moore v. Moore*, 6 Jones' Eq. 132; *Richards v. Moore*, 5 Redf. 278; *Beans v. Bowen*, 47 How. Pr. 306; *Knox v. Jones*, 47 N. Y. 389; *Manice v. Manice*, 43 id. 303-384; *Savage v. Burnham*, 17 id. 561, 576; *Van Schuyver v. Mulford*, 59 id. 426, 431; *Tiers v. Tiers*, 98 id. 568-573; *Kennedy v. Hoy*, 105 id. 134.) An imperative, but non-enforceable general trust, like the one under discussion, cannot be converted into a special power in trust, and be good. (*Van Veghten v. Van Veghten*, 8 Paige, 104-124; *Belmont v. O'Brien*, 12 N. Y. 394-404; *Moncrief v. Ross*, 50 id. 431, 436; *Garvey v. McDevitt*, 72 id. 556, 562; 11 Hun, 457-460; *Cutting v. Cutting*, 86 N. Y. 522, 541; *Delaney v. McCormack*, 88 id. 174, 181; *Coleman v. Beach*, 97 id. 545, 558; *Cooke v. Platt*, 98 id. 35; *Chamberlain v. Taylor*, 105 id. 185, 192; *Woerz v. Rademacher*, 120 id. 62-68; *Weeks v. Cornwell*, 104 id. 325-339.)

BROWN, J. Samuel J. Tilden died in August, 1886, leaving a last will and testament dated in April, 1884. He left surviving him as his only next of kin and heirs at law one sister, two nephews, one of whom is the plaintiff in this action, and four nieces.

The defendants Bigelow, Green and Smith, were by the will appointed the executors thereof, and trustees of the trusts therein created, and the will having been duly admitted to probate in

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October, 1886, they immediately qualified and entered upon the discharge of their duties as such.

This action was brought to obtain a construction of the will. By the complaint the thirty-third, thirty-fourth, and thirty-fifth articles were assailed as being invalid, but upon the trial no question was raised as to the two first named and no determination in respect thereto was made.

The Supreme Court held that the effect of the thirty-fifth and thirty-ninth articles of the will was to create one general trust for charitable purposes, embracing the entire residuary estate and vested in the trustees a discretion with respect to the disposition of such estate by them. That the testator did not intend to, and did not confer upon any person or persons, any enforceable right to any portion of said residuary estate and did not designate any beneficiary who was or would be entitled to demand the execution of the trust in his or its behalf and declared the provision of the will relating to the disposal of the residuary estate for such reasons illegal and void.

It is essential to a proper understanding of the will to read the two articles above named together and they are here quoted, the last being placed first.

“Thirty-ninth. I hereby devise and bequeath to my said executors and trustees and to their successors in the trust hereby created and to the survivors or survivor of them, all the rest, residue and remainder of all the property, real and personal, of whatever name or nature, and wheresoever situated of which I may be seized or possessed, or to which I may be entitled at the time of my decease, which may remain after instituting the several trusts for the benefit of specific persons; and after making provision for the specific bequests and objects as herein directed, to have and to hold the same unto my said executors and trustees, and to their successors in the trust hereby created, and the survivors or survivor of them in trust, to possess, hold, manage and take care of the same during a period not exceeding two lives in being; that is to say, the lives of my niece, Ruby S. Tilden, and my grandniece Susie Whittlesey, and until the decease of the survivor of the said

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two persons, and after deducting all necessary and proper expenses, to apply the same and the proceeds thereof to the objects and purposes mentioned in this my will."

"Thirty-fifth. I request my said executors and trustees to obtain, as speedily as possible, from the legislature an act of incorporation of an institution to be known as the 'Tilden Trust' with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number; and in case said institution shall be incorporated in a form and manner satisfactory to my said executors and trustees during the life-time of the survivor of the two lives in being upon which the trust of my general estate herein created is limited, to wit.: the lives of Ruby S. Tilden and Susie Whittlesey, I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof, and to convey or apply to the use of the same the rest, residue and remainder of all my real and personal estate not specifically disposed of by this instrument, or so much thereof as they may deem expedient, but subject nevertheless, to the special trusts herein directed to be constituted for particular persons, and to the obligations to make and keep good the said special trusts, provided that the said corporation shall be authorized by law to assume the obligations. But in case such institution shall not be so incorporated during the life-time of the survivor of the said Ruby S. Tilden and Susie Whittlesey, or if for any cause or reason my said executors and trustees shall deem it inexpedient to convey the said rest, residue and remainder, or any part thereof, or to apply the same or any part thereof to said institution, I authorize my said executors and trustees to apply the rest, residue and remainder of my property, real and personal, after making good the said special trusts herein directed to be constituted or such portion thereof as they may not deem it expedient to apply to its use, to such charitable, educational and scientific purposes as in the

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judgment of my said executors and trustees will render the said rest, residue and remainder of my property most widely and substantially beneficial to the interests of mankind."

On March 26, 1887, subsequent to the commencement of this action, the legislature passed an act incorporating the "Tilden Trust" and authorizing it to establish and maintain a free library and reading-room in the city of New York. The institution was organized, and the executors and trustees made to it a conveyance of the residuary estate and the conveyance was formally accepted by the trustees thereof. ✓

The law is settled in this state that a certain designated beneficiary is essential to the creation of a valid trust.

The remark of Judge WRIGHT in *Levy v. Levy* (33 N. Y. 107), that "if there is a single postulate of the common law established by an unbroken line of decisions it is that a trust without a certain beneficiary who can claim its enforcement is void" has been repeated and reiterated by recent decisions of this court (*Prichard v. Thompson*, 95 N. Y. 76; *Holland v. Alcock*, 108 id. 312; *Read v. Williams*, 125 id. 560), and the objection is not obviated by the existence of a power in the trustees to select a beneficiary unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain who were the objects of the power.

The equitable rule that prevailed in the English Court of Chancery known as the *cy pres* doctrine and which was applied to uphold gifts for charitable purposes when no beneficiary was named has no place in the jurisprudence of this state. (✓ *Holmes v. Mead*, 52 N. Y. 336; *Holland v. Alcock*, *supra*.)

If the Tilden Trust is but one of the beneficiaries which the trustees may select as an object of the testator's bounty, then it is clear and conceded by the appellants that the power conferred by the will upon the executors is void for indefiniteness and uncertainty in objects and purposes. The range of selection is unlimited. It is not confined to charitable institutions of this state or of the United States but embraces the whole world. Nothing could be more indefinite or uncertain, and broader

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and more unlimited power could not be conferred than to apply the estate to "such charitable, educational and scientific purposes as in the judgment of my executors will render said residue of my property most widely and substantially beneficial to mankind."

"A charitable use where neither law or public policy forbids may be applied to almost anything that tends to promote the well doing and well being of social man." (Perry on Trusts, § 637.)

Unless, therefore, within the rules which control courts in the construction of wills we can separate the provision in reference to the Tilden Trust from the general direction as to the disposition of the testator's residuary estate, contained in the last clause of the thirty-fifth article, and find therein that a preferential right to some or all of such estate is given to that institution when incorporated, and one which the court at the suit of said institution could enforce within the two lives which limit the trust, we must, within the principle of the cases cited, declare such provisions of the will invalid and affirm the judgment of the Supreme Court. The appellants claim that the power conferred upon the executors to endow the Tilden Trust may be upheld independent of the invalidity of the power given to apply the estate to such charities as would most widely benefit mankind.

The proposition is that by the thirty-fifth article the testator made two distinct alternative provisions for the disposition of his residuary estate. One primary for the incorporation and endowment of the Tilden Trust, the other ulterior and to be effectual only in case the executors deemed it inexpedient to apply the residue to that corporation, and it is claimed that this provision of the will constitutes a trust to be executed for the benefit of the Tilden Trust or confers upon the trustees a power in trust or that it constitutes a gift in the nature of an executory devise.

The latter proposition rests upon the assumption that there is by the will a primary gift complete and perfect in itself to the Tilden Trust that vests the title in that corporation immediately upon its creation.

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That a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is called into being within the time allowed for the vesting of future estates, is not denied. (Perry on Trusts, 372, § 736.)

That question was decided in *Inglis v. Trustees of the Sailors' Snug Harbour* (3 Peters, 99), and in *Burrill v. Boardman* (43 N. Y. 254).

In those cases the gift was treated as in the nature of an executory devise dependent upon the incorporation of the institution contemplated by the will and which would vest upon the occurrence of that event.

But in view of the language of the will before us that proposition cannot be maintained here.

By an executory devise a freehold was limited to commence in the future and needed no particular estate to support it. It arose upon the happening of a specified event and the fee descended to the heir at law until the contingency happened. By our Revised Statutes executory devises are abolished and expectant estates are substituted in their place, and such estates when the contingency happens upon which they are limited vest by force of the instrument creating them and this right in the expectant cannot be defeated by any person. But the testator here intended not to create such an estate. The Tilden Trust takes nothing by virtue of the will. The residuary estate is vested in the trustees or intended to be and it is solely by their action that it is to become vested in the Tilden Trust.

It is only in case that the executors deem it expedient so to do that they are to convey the whole or any part of the residue to the Tilden Trust. Whether that corporation should take anything rested wholly in the discretion of the executors, as the expediency or in expediency of an act is always a matter of pure discretion. (2 Perry on Trusts, §§ 506, 507.)

Every expression used in the will indicates the bestowal of complete discretionary power to convey or not to convey, and the creation and bestowal of such a power in the executors is wholly opposed to and fatal to the existence of an executory devise.

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In this respect the case differs from those cited.

In *Inglis v. The Sailors' Snug Harbour*, there was no trust created, no discretion vested in the executor, no conveyance to be made after the testator's death. His intention to give his property to a corporation to be created to carry out his charitable purpose was clear. Such was the fact also in *Burrill v. Boardman*.

By the will in that case the property was given directly to the corporation which the testator contemplated should be created after his death. No trust was created and no discretion was bestowed upon the executors to determine whether the corporation should or should not have it.

Once created, the property by force of the will vested in the corporation. The only similarity between that case and this is that the trustees there, as here, were directed to apply to the legislature for an act of incorporation. In case the legislature refused to grant a liberal charter then the trustees were directed to pay over the estate to the government of the United States.

But no discretion was given to the executors to determine upon any event whether or not the corporation once created should take the property.

"Nothing" said Chief Justice CHURCH "can be more certain than that the testator designed that the title to the funds or property in the possession of the trustees or elsewhere which was included in the residuary clause should vest in the corporation immediately upon its creation."

"An application was to be made to the legislature, after the testator's death, for a charter. If obtained the bequest would take effect; if not it would go the ulterior donee. If the corporation applied for and granted should not be liberal and in accordance with the provisions of the will, the ulterior donee or next of kin could challenge its right to take the bequest. It would then become a judicial question." So clearly no question in that case was left to the judgment of the trustees. They were not to determine even whether the charter was a liberal one. That was a question for the court that would have been decided in any contest over the property between the

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corporation and the next of kin or ulterior donee. A discretionary power in executors or trustees was not, therefore, an element in the *Burrill* case. Not so here. Here we have the unlimited authority delegated to the executors to withhold the entire property from the corporation if they choose so to do. There the corporation once created was vested immediately by force of the will with the title to the property. Here, although the corporation may be created in a form and manner satisfactory to the trustees, it takes nothing unless the executors, considering every cause and reason, deem it expedient to convey to it some or all of the residuary estate.

In the *Burrill* case the testator made a direct gift to a designated beneficiary, the Roosevelt hospital. In this case Mr. Tilden gave nothing to the Tilden Trust, but simply authorized his executors to endow it if, in their judgment and discretion, they should deem it expedient. Moreover after creating numerous special trusts and setting apart portions of his real estate for such several special trust funds, the testator, by the thirty-ninth article of the will, gives the whole of the residuary estate to his executors in trust for the purposes mentioned in the thirty-fifth article, bestowing upon them so far as language could do so, the title to all the property to be held and possessed during the lives of his niece Ruby S. Tilden and his grandniece Susie Whittlesey, and which he denominated the "General Trust" of his estate. He clearly intended by this provision to create an active trust in his whole residuary estate and to give to his executors a discretionary power to give such part of it as they deemed expedient to the Tilden Trust, or to withhold all from it. Having intended to convey so far as he was able to do the title to his whole estate to trustees, nothing was left that could be the subject of a gift to the Tilden Trust.

We come, therefore, to the consideration of the question whether the thirty-fifth article can be upheld as constituting a separate trust or power in trust for the benefit of the Tilden Trust.

The affirmative of this question can be maintained only by considering the direction to convey to the Tilden Trust as a

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power separate by itself and distinct and independent from the power to convey to such charitable purposes as in the judgment of the trustees would be most widely and substantially beneficial to mankind.

The latter provision is eliminated from the will altogether by the appellants, and then the instrument is construed as if the eliminated provision had never existed.

The appellants invoke the aid of the principle that where several trusts are created by a will which are independent of each other, and each complete in itself, some of which are lawful and others unlawful, and which may be separated from each other, the illegal trusts may be cut off and the legal ones permitted to stand.

This rule is of frequent application in the construction of wills, but it can be applied only in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the purpose of the will or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property.

The rule as applied in all reported cases recognizes this limitation, that when some of the trusts in a will are legal and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries, or some of them, then all the trusts must be construed together and all must be held illegal and must fall. (*Manice v. Manice*, 43 N. Y. 303; *Van Schuyver v. Mulford*, 59 id. 426; *Knox v. Jones*, 47 id. 389; *Benedict v. Webb*, 98 id. 460; *Kennedy v. Hoy*, 105 id. 135.)

The cases cited fairly illustrate the practical application of this rule by the courts.

In *Knox v. Jones* the testator created one trust to receive and pay over the income of his estate to his brother for his life and then to his sisters, with cross-limitations over as between them, remainder to the children of his sister Georgiana, and in default of children to Columbia college. This court held the

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whole trust invalid and refused to sustain the provision in behalf of the testator's brother on the ground that there was but a single trust which provided for all the beneficiaries, and that they were all embraced in a common purpose. That the several provisions of a single trust could not be severed, and those that violated the statute against perpetuities dropped and the others sustained. In *Van Schuyver v. Mulford* a gift to the testator's wife of the rents and income and profits of the estate during life was upheld and declared to be valid, although the devise over might be void on the ground that the gift to the wife was separate and distinct from the other provision of the will and had no effect beyond her life or upon the ultimate disposition of the estate.

In *Benedict v. Webb*, the testator created separate trusts in two-thirds of his estate for the benefit of his four children. Three of the trusts were held to be valid and one invalid on the ground that the trust term transgressed the statute. But the court refused to sustain the valid trusts on the ground that to do so would defeat the intention of the testator in the disposition of his property and work injustice among the beneficiaries by permitting three of the children to take under their respective trusts and also as heirs at law in the one-fourth as to which the trust was declared invalid.

The result of these and all other cases is that in applying the rule invoked by the appellants, which permits unlawful trusts to be eliminated from the will, and those that are lawful to be enforced, we must not violate the intention of the testator, or destroy the scheme that he has created for the disposition of his property.

We may enforce and effectuate his will and give full effect to his intent, provided it does not violate any cardinal rule of law, but we cannot make a new will or build up a scheme for the purpose of carrying out what might be thought was or would be in accordance with his wishes.

At the threshold of every suit for the construction of a will lies the rule that the court must give such construction to its provisions as will effectuate the general intent of the testator

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as expressed in the whole instrument. It may transpose words and phrases and read its provisions in an order different from that in which they appear in the instrument, insert or leave out provisions if necessary, but only in aid of the testator's intent and purpose. Never to devise a new scheme or to make a new will.

The fact that the executors of the will applied to the legislature and procured the incorporation of the Tilden Trust in a form and manner satisfactory to themselves, and have deemed it expedient to convey to it the whole residuary estate and have executed a conveyance thereof, is not a matter for consideration in this connection. This point was considered in *Holland v. Alcock* and in *Read v. Williams (supra)*, and it was held that the validity of the power depended upon its nature and not on its execution. In the latter case, the testator bequeathed the residue of his estate "to such charitable institutions and in such proportion as my executors by and with the advice of my friend Rev. John Hall, D. D., shall choose and designate." And prior to the commencement of the action, the executors, with the advice of Dr. Hall, made a written choice and designation of certain incorporated institutions existing under the laws of this state, among whom they directed the residuary estate to be divided. The fact of selection was not deemed material and the will was declared invalid.

The rights of heirs and next of kin exist under the Statutes of Descent and Distribution, and vest immediately upon the death of the testator.

If the trust or power attempted to be created by the will, or the disposition therein made is valid, their rights are subject to it, but if invalid, they immediately become entitled to the property. Hence the existence of a valid trust is essential to one claiming as trustee to withhold the property from the heir or next of kin. What a trustee or donee of a power may do becomes, therefore, immaterial. What he does must be done under a valid power, or the act is unlawful. If the power exercised is unauthorized, the act is of no force or validity.

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In such case there is no trust or power. There is nothing but an unauthorized act ineffectual for any purpose.

It is not deemed material to the decision of the question now under consideration whether the provisions of the will relating to the residuary estate are regarded as constituting a trust or a power in trust, except so far as that fact may be indicative of the testator's intention.

If there was a trust, then the executors took title to the residuary estate, but if there is created a valid power in trust, it will be executed with substantially the same effect as if the will created a trust estate. But section 58 of the Statute of Uses and Trusts, which declares that when an express trust is created for any purpose not enumerated in the foregoing sections, no estate shall vest in the trustees, but the trust, if directing the performance of an act which may be lawfully performed under a power, should be valid as a power in trust, is not, of course, susceptible of the construction that a trust invalid because in conflict with some cardinal rule of law could be upheld as a power.

Every trust necessarily includes a power. There is always something to be done to the trust property and the trustee is empowered to do it, and if the trust is invalid because the power to dispose of the property is not one that the law recognizes, it cannot be upheld as a power in trust. The rules applicable to the execution of trusts in this respect are equally applicable to the execution of powers, and as it is of no particular importance in this case in whom the title to the residuary estate is vested, it is not material to the decision whether the provisions of the will are examined as a trust or as a power in trust. The purpose of the trust is lawful, and personal property which constitutes the greater part of the testator's estate was a proper subject of the trust that the testator intended, and if it is invalid, it is because the power conferred on the trustees for the disposal of the estate is so uncertain and indefinite that its execution cannot be controlled or enforced by the courts.

In *Prichard v. Thompson*, the legal title to the fund was vested in the executors in trust. In *Read v. Williams*, the

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executors were given a power in trust. But the court said there was in that respect no legal distinction, and the power in the latter, as the trust in the former case, was declared invalid.

But the nature of the estate which the testator intended to convey to his trustees and the nature of the power intended to be delegated to them is of importance in ascertaining his intent and determining what was the scheme that he had for the disposal of his property. By our Revised Statutes (vol. 1, p. 733), powers, as they existed by the common law, were abolished, and thereafter their creation, construction and execution were to be governed by statute. They are classified as general and special, beneficial and in trust. A beneficial power is one that has for its object the grantee of the power, and is executed solely for his benefit. (§ 79.) Trust powers, on the other hand, have for their object persons other than the grantee, and are executed solely for the benefit of such other persons. (§§ 94, 95.) Trust powers are imperative, and their performance may be compelled in equity, unless their execution or non-execution is made expressly to depend on the will of the grantee. (§ 96.) And a trust power does not cease to be imperative where the grantee of the power has the right of selection among a class of objects. (§ 97.) And sections one hundred and one hundred and one make provision for the execution by a court of equity of trust powers where the trustee dies, or where the testator has created a valid power, but has omitted to designate a person to execute it. A trust power, to be valid, therefore, must designate some person, or class of persons, other than the grantee of the power, as its objects, and it must be exercised for the sole benefit of such designated beneficiary, and its execution may be compelled in equity. A non-enforceable trust power is an impossibility under our law, unless, by the instrument creating it, it is expressly made to depend for its execution on the will of the grantee.

In every case where the trust is valid as a power, the lands to which the trust relates remain in or descend to the persons

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otherwise entitled, subject to the execution of the trust as a power. (1 R. S. 729, § 59.)

Before applying these rules to the case before us, our duty is to ascertain the testator's intent from an inspection of the will, and for this purpose we must read the whole instrument, including the provisions admitted to be void. Those provisions, though ineffectual to dispose of the property, cannot be obliterated when examining it for the purpose of ascertaining the testator's intention. (*Van Kleeck v. Dutch Church*, 20 Wend. 457; *Kiah v. Grenier*, 56 N. Y. 220.)

The prominent fact in the testator's will is that he intended to give his property to charity. He intended that none of his heirs or next of kin should take any of it, except such as he gave to them through the several special trusts that he created for their benefit. He emphasized this purpose in the last article of his will by providing that any of them who should institute or share in any proceeding to oppose the probate of the will, or to impeach, impair, or to set aside or invalidate any of its provisions, should be excluded from any participation in the estate, and the portion to which he or she might otherwise be entitled to under its provisions should be devoted to such charitable purposes as his executors should designate. To the accomplishment of this purpose, he intended to create a trust, and doubtless believed that he created a valid one. He created numerous trusts for the benefit of his relatives and for the creation of other libraries and reading-rooms. These he denominated "Special Trusts." In the thirty-ninth article he devised and bequeathed to his executors and "to their successors in the trust hereby created, and to the survivor and survivors of them," all the rest and residue of his property, "to have and to hold the same unto my said executors and trustees and to their successors in the trust hereby created * * * to possess, hold and manage the same" during the lives of his niece, Ruby S. Tilden, and his grand-niece, Susie Wittlesey, and "to apply the same and the proceeds thereof to the objects and purposes mentioned in this my will." He gave to his executors the power to collect the income of the whole estate,

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that which was set apart in the special trusts and that constituting the trust of the residuary estate. The trust of the residuary estate he denominated the "General Trust," and in the twenty-sixth article he gives direction as to the disposition of the surplus income "during the continuance of the trust of my general estate."

It is clear, therefore, that the testator intended to create a trust of his residuary estate, and in plain, unequivocal language he indicated his purpose to be that the trustees should be vested with the title to the property until they should divest themselves of it in carrying out the purposes mentioned in the will, and which are to be found in the thirty-fifth article. Turning to this article, the important feature is that the power there given to the trustees, and the only power that could absolutely effectuate the testator's intent to devote his property to charity, was an imperative one.

There is no discretion to be exercised upon the question whether the property shall go to charitable purposes. There is no act involving that disposition of the property the execution of which is made to depend on the will of the trustees.

Discretion there is as to the objects of the charity, but none as to the general disposition of the estate. If the Tilden Trust is incorporated in a form and manner satisfactory to the trustees they are authorized to convey to that institution the whole residue or so much thereof as they shall deem expedient, and if for any cause or reason they deem it inexpedient to endow that institution with the whole or any part of the residue, then to apply the same or such part as they do not apply to the use of the Tilden Trust to such charitable purposes as they shall deem most widely beneficial to mankind.

The object and purpose in this scheme of the testator is, therefore, a devotion of his estate to charity.

But it is said that the Tilden Trust represents an intention different from and alternative to the gift to the charitable, educational and scientific purposes mentioned in the last clause of the article. That the authority to endow it that is vested in the trustees is a primary power and the power to devote the estate to the other undefined purposes is ulterior.

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That while the latter is imperative in its character, the former is discretionary wholly, and depends for its execution upon the will of the trustees, and that each power stands alone separate and distinct from the other, and the power to endow the Tilden Trust is likened to a power of appointment.

Powers of appointment are so common in testamentary dispositions of property that no citation of authority is necessary to show their validity.

Their execution may depend solely upon the will of the donee of the power, and they are recognized as valid by the ninety-sixth section of the statute already quoted. "I give to A. such portion of my residuary estate as B. shall, within the life-time of the survivor of C. and D., designate and appoint," which is the case suggested on the brief, is undoubtedly a good testamentary bequest, and is a good illustration of a naked power of appointment, the execution of which depends on the will of B., and is not enforceable at the suit of A.

In such a case the title to the property descends to the heirs or next of kin, or passes under the will to the ulterior donee, subject to the execution of the power.

But there is no similarity between the suggested bequest and the will before us. Follow that bequest by a gift over to charitable uses, or let it stand alone in the will, and you have in one case alternative gifts and in the other alternative purposes.

There is a preference expressed or implied by the testator as to the purpose to which his estate shall go and the objects that shall be benefited.

In the one case the choice lies between the individual legatee and the heirs, in the other between the legatee and a disposition to charity.

But in the will before us there is no alternative purpose. There is a single scheme, a gift to charitable uses, and the suggestion of the Tilden Trust indicates no intent in the testator's mind contrary to the intention to devote the estate to charity, and in this respect the will before us is distinguished from the case suggested by the learned counsel for the appellants of a

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power to convey the estate to a designated individual at a stated age, and in the event of the donee of the power deeming it inexpedient so to do, then a gift over to undefined charitable uses.

There the primary purpose of the testator is a gift to the designated legatee and not to charity. And the intent to give the estate to charitable uses is secondary and limited upon the determination of the trustee not to make the primary gift. Such a will plainly indicates alternative purposes and contains alternative powers. The two gifts are in no respect connected, and if the gift over is void, the first may stand and, if executed, represents the will of the testator.

But in the thirty-fifth article of the will under consideration there is no antithesis so far as the purpose to which the property is to be devoted is concerned. It expresses a single intent only, viz.: To devote the estate to charitable uses, and while, of course, in such a scheme the testator might prefer and designate one corporation over another as the object of his bounty, I shall attempt to show that in this case he has not done that and has not conferred any preferential right to the estate or any part of it upon the Tilden Trust.

What is the Tilden Trust and how does it stand in the testator's scheme?

It may fairly be assumed that the testator, having determined to devote his estate to charity, understood that his object could be accomplished only through the instrumentality of a corporate body.

He requested his trustees to cause the Tilden Trust to be incorporated. It was to have the power to establish and maintain a free library and reading-room in the city of New York, and "to promote such scientific and educational objects" as the executors and trustees should designate. The latter power is precisely what the trustees are authorized to do by the so-called ulterior provision, viz., to apply the estate to such "educational and scientific purposes" as they should judge would be most beneficial to mankind.

Here, therefore, we have an authority to do the same thing

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in each provision of the will, and as the latter could only be worked out through the medium of a corporation, the so-called two powers are the same. So as to the free library and reading-room. That is plainly within the scientific and educational purposes of the second provision of the will, and could be maintained only through a corporate body. The suggested capacities of the Tilden Trust are, therefore, precisely the same as the so-called ulterior purposes, and each are expressive of the testator's scheme so far as he had formulated it in his own mind. The Tilden Trust, therefore, plainly does not represent any alternative or primary purpose in the disposition of the estate, but is simply the suggested instrument to execute the testator's scheme for the disposition of the property. Now, what did the testator intend the trustees should consider when they came to the determination of the expediency or in expediency of endowing that institution. The argument is that they could not consider the ulterior purposes at all until they had disposed of the question whether it was expedient to convey to the Tilden Trust all or a part of the residuary estate.

But that is saying that they should determine that question without reference to the substance of the gift and the object and purposes which the testator had in view. For, as I have already shown, the capacities and powers of the Tilden Trust, in other words, its purposes and objects, or rather the purposes and objects which the testator intended to effectuate through its instrumentality, are precisely the same as the so-called ulterior purposes, and as the latter must be carried out through the instrumentality of a corporation, the only distinction between the two is in the name of the corporation that is to administer the fund. The question of expediency, therefore, resolves itself into a question whether the trustees should select the Tilden Trust, or some other corporation, through which to carry out the purposes of the will. Now, how could the trustees, charged with the imperative duty of devoting the estate to charitable and educational purposes, consider the question whether they should endow the Tilden Trust without taking a complete view of the whole field of charity.

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They were bound to do so if they fairly attempted to carry out the testator's plan.

Take the question of the free library and reading-room. There is no duty or obligation imposed upon them in that respect. They are not bound to create or endow one. They are free to select any other educational object. So with locality. Can it be seriously claimed that there is any duty resting on them to establish a library in the city of New York? Is not the capital of the state or of the United States open to their choice of location, if they think a library located there would be more widely beneficial to mankind? Clearly, it appears to me that it was within the scope of the discretion committed to the trustees to determine whether a free library or reading-room should be established at all, and whether that or any other charitable or educational institution that they might select should be located in the city of New York, and that their determination of such question would be among the causes or reasons which might lead them to decide that it was inexpedient to endow the Tilden Trust, and that the testator intended that when the trustees should consider the Tilden Trust, they should consider their power with reference to the disposal of the estate, and the fact that if they did not endow that institution, they could still execute his wishes by applying it to such charitable, educational and scientific purposes as they should select.

In other words, that if they did not give it to the institution that he suggested and which would bear his name, they could give it to others and still execute his will and carry out his general purpose for the disposal of his estate, and this power meant comparison of all charitable and educational objects, and selection from among them.

In substance he said to his executors: I have determined to devote my estate to charitable, educational and scientific purposes; I have formed no detailed plan how that purpose can be executed, but under the law of New York it must be done through and by means of a corporation. I request you to cause to be incorporated an institution to be called the Tilden

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Trust with capacity to maintain a free library and reading-room in the city of New York, and such other educational and scientific objects as you shall designate, and if you deem it expedient, that is, if you think it advisable and the fit and proper thing to do, convey to that institution all or such part of my residuary estate as you choose, and if you do not think that course advisable then apply it to such charitable, educational and scientific purposes as in your judgment will most substantially benefit mankind. Thus was left to the trustees the power to dispose of the estate within the limits defined and to select the objects that should be benefited, and it is impossible to read the thirty-fifth article and find therein any preference in the way of a separate gift or power to the Tilden Trust or to separate that institution from the testator's plan to devote his estate to charity. The trustees are free to select the Tilden Trust and cause it to be incorporated or to choose any existing corporation as the instrument to carry out the testator's scheme. Again, no event is named upon the happening of which any estate is limited to the Tilden Trust. The only condition suggested is the determination by the trustees of the question whether they deem it expedient to endow that institution. But if the views already expressed are correct, if the Tilden Trust is but one of many instruments through which the testator's charitable purposes may be executed or is but a suggested beneficiary under the power, then the determination of the question of expediency involves the doing of the very thing which the law condemns, viz., a selection from an undefined and unlimited class of objects, and the power would be void.

It thus becomes apparent how important is the so-called ulterior provision in the plan which the testator had for the disposal of his estate, and effect cannot be given to that plan if that provision is stricken from the will, as it expressly defines the scope of the discretion committed to the trustees.

Strike out that provision and instead of a discretion in the trustees limited to the selection of the objects that should be benefited by the will their power would be confined to the

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endowment of the Tilden Trust, and if they choose not to act or failed to act the estate would go to the heirs at law. Indeed the legal effect of the will would be in that case to vest the title to the estate in the heirs subject to the execution of the power to endow the Tilden Trust.

But if the provision of the will makes one thing particularly clear it is that the testator intended his estate to be devoted to charitable purposes and should in no event go to his heirs, and he did not intend that his trustees should have the power to choose between his heirs and the Tilden Trust.

We cannot, therefore, obliterate the so-called ulterior provision and give effect to the scheme of the will.

The discretion plainly conferred on the trustees in the delegation of the power to determine the expediency or in expediency of endowing the Tilden Trust would be thereby destroyed, and the trustees would be compelled to convey the estate to that institution, or by permitting the heirs to retain it, thwart the expressed wish of the testator.

Again, the appellants argue that the power to endow the Tilden Trust is one depending for its execution on the will of the trustees and is not imperative, and hence not subject to the test whether it can be enforced in a court of equity. This argument is, perhaps, fairly answered when the conclusion is reached that the ulterior purpose cannot be stricken from the will and that the thirty-fifth article represents but one scheme and one purpose for the disposal of the estate.

But it will be apparent in the view here taken that the testator did not intend that any power conferred upon his trustees should depend for its execution upon their will. Of course, in every power where the trustees have the right to select any and exclude others, there is necessarily involved discretion, and the final choice does in one sense rest upon the will of the trustee, but not as that term is used in the statute. The power conferred is the authority to convey the estate. That is imperative. The discretion committed to the trustee was to select the particular object. The choice depends on the trustees' will, but the act of choosing is imperative, else the power

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could not be executed. It is the result alone, therefore, that depends on the will of the trustees and not the performance of the act of selection. A power is defined to be "an authority to do some act * * * which the one granting or reserving such power might himself lawfully perform." (1 R. S. 732, § 74.) Section 58 provides that if the unauthorized trust there mentioned directs the "performance of any act" which may be lawfully performed under a power, that it shall be valid as a power in trust.

Now the acts authorized by the testator were those of selection and conveyance. The result of selection depended on the will of the trustees, whether they should choose one corporation or another, but the performance of the act of selection was just as obligatory as the duty to convey. The testator intended both should be performed, and the trustees could no more refuse or neglect one than the other. It follows from the views here expressed that the authority to endow the Tilden Trust, if that should be deemed expedient by the trustees, was not a separate power, distinct from the purpose to devote the estate to charitable uses, but was incidental to the testator's scheme and involved therein.

While we may admit that the testator expressed a preference for a corporation that should bear his name, he conferred no right upon that institution. The purpose to which the estate should be applied he determined and designated, but the persons who should be benefited by the will and the particular institution that should administer the fund was left to the selection of the trustees. The expression of a preference conferred no right so long as the final choice was left to the trustees. ✓

It was simply a suggestion which they might or might not adopt and imposed no duty upon them, and in no way limited or fettered their action. (*Lawrence v. Cooke*, 104 N. Y. 632; 2 Pomroy's Eq. J. 1016, note.) ~

We are of the opinion, therefore, that the thirty-fifth article of the will does not confer separate powers upon the trustees and that the so-called ulterior provision cannot be eliminated from the will without destroying the scheme that the testator

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designed for the disposal of his estate. That the whole article represents one entire and inseparable charitable scheme, and cannot be subdivided, and the power conferred on the trustees is one of selection.

This power was under the statute special and in trust. Under the sections heretofore quoted such a power is imperative and imposes a duty on the grantee, the performance of which may be compelled in equity for the benefit of the parties interested, unless its execution or non-execution is made expressly to depend on the will of the grantee, and it does not cease to be imperative where the grantee has the right to select any and exclude others of the persons designated as the objects of the power.

The power conferred by the will not being made to depend for its execution on the will of the trustees was, therefore, imperative, but it is not valid unless it can be enforced by the courts at the suit of some beneficiary.

As the selection of the objects of the trust was delegated absolutely to the trustees, there is no person or corporation who could demand any part of the estate or maintain an action to compel the trustees to execute the power in their favor. This is the fatal defect in the will. The will of the trustees is made controlling, and not the will of the testator.

As was said by the learned presiding justice of the General Term, "the radical vice of the entire provision seems to have arisen from the testator's unwillingness to confer any enforceable rights upon any qualified person or body."

Under the statute of powers there may be a power of selection and exclusion with regard to designated objects, and the duty there imposed is made imperative and enforceable by the court.

But the statute presupposes that a power of selection must be so defined in respect to the objects that there are persons who can come into court and say that they are embraced within the class and demand the enforcement of the power. (*Read v. Williams, supra*, p. 569.)

The views which Judge VAN BRUNT expressed in that case

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on that point at General Term received direct approval in this court. He said: "It is conceded that the power contained in the clause in question comes under the head of a special power in trust as defined in the Revised Statutes, but it is said such a power is to be distinguished from a trust;" that the words "in trust" are used for purposes of classification only. We think, however, that to render a power in trust valid the same certainty as to beneficiary must exist as in the case of a trust. (27 N. Y. State Rep. 507.)

These views find full confirmation in the provision of the statute to the effect that if the trustee dies leaving the power unexecuted a court of equity will decree its execution for the benefit equally of all persons designated, and if the testator fails to designate the person by whom the power is to be executed, its execution devolves upon the court (§§ 100, 101), thus providing a scheme which prevents the failure of a testator's purpose when its subject is certain and its objects designated.

But in this case execution of the power could not be decreed by the court in either of the cases specified in the statute.

By an enforceable trust is meant one in which some person or class of persons have a right to all or a part of a designated fund, and can demand its conveyance to them, and in case such demand is refused may sue the trustee in a court of equity and compel compliance with the demand.

In this case the testator devolved upon his executors the duty of selecting the beneficiary and there is no person who has the right to enforce that duty or demand any part of the estate in case the executors refuse or neglect to act.

The power attempted to be vested in the trustees cannot be controlled or enforced, and whether the provisions of the will relating to the residuary estate be regarded as creating a trust or power in trust, they are in either case void.

The judgment should be affirmed.

BRADLEY, J. (dissenting). This action for the construction of the will of Samuel J. Tilden, deceased, was founded on the

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charge that it was ineffectual to dispose of the residuary estate or to provide for any lawful disposition of it, because the provisions of the thirty-fifth article by which that was sought to be accomplished were invalid in that they were as to both the object and subject of the trust he had in view indefinite and uncertain. If this proposition is supported the conclusion that such was the effect necessarily follows.

It is evident that the testator when he made his will intended not to die intestate as to any of his property. And that his purpose to make testamentary disposition of all of it not only appears by the dispositional provisions of his will, but also by those of the forty-third article by which he declared: "Since I have made a disposition of my property according to my best judgment, and since, as most of the devisees under it are females, it is impossible to foresee under what influences some one or more of them might possibly come, and since it is desirable to avert unseemly or speculative litigation, I hereby declare it to be my will that in case any person who, if I had died intestate, would be entitled to any share of my property or estate, shall under any pretense whatever institute, take or share in any proceeding to oppose the probate of this, my last will and testament, or to impeach or impair or to set aside or invalidate any of its provisions, any devise or legacy to or for the benefit of such person or persons under this will is hereby revoked, and such person shall be excluded from any participation in and shall not have any share or portion of my property or estate, real or personal; and the portion to which such person might be entitled under the provisions of this instrument shall be devoted to such charitable purposes as my said executors and trustees shall designate."

In proceeding to the consideration of the questions presented, it may be observed as a cardinal rule of construction that the intent of a testator should be sought for in the provisions of his will, and when so ascertained effectuated, if the language used permits, although the transposition, rejection or supply of words may be required to clearly express such intention. And when susceptible of it, the construction will

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be given which renders it operative rather than invalid. (*Hoppock v. Tucker*, 59 N. Y. 203; *Phillips v. Davies*, 92 id. 199; *DuBois v. Ray*, 35 id. 162.)

He had in view the creation and endowment of a Tilden Trust with the capacity mentioned. He, therefore, requested the executors and trustees to obtain as speedily as possible from the legislature an act of incorporation of an institution to be known as the Tilden Trust, and in case that should be accomplished within the time limited by the two lives mentioned, he authorized them to organize the institution and convey to or apply to its use the rest, residue and remainder of his estate or so much of it as they should deem expedient. Thus far he has in practical effect directed the application to be made for legislative action, and has made no provision for the disposition of the fund other than to the use of the corporation in the event of its creation. And because that was a contingency not within the control of the executors and trustees and for other reasons which might exist at the time of his death to render the endowment of the Tilden Trust, if created, inexpedient, the testator with a view to entire testacy added: "But in case such institution shall not be so incorporated * * * or if for any cause or reason my said executors and trustees shall deem it inexpedient to convey said rest, residue and remainder or any part thereof or to apply the same or any part thereof to the said institution I authorize" them to apply it "or such portion thereof as they may not deem it expedient to apply to its use, to such charitable, educational and scientific purposes as in the judgment of my said executors and trustees will render the said rest, residue and remainder of my property most widely and substantially beneficial to the interests of mankind." This provision, treated independently of any other, requires no consideration. The *cy pres* doctrine available to give effect to trusts for charitable uses without any defined beneficiary in England has no place in the law of this state. The attempt thus made by the testator to provide, in the event mentioned, for a trust dependent upon the selection by the executors and trustees of the charitable, educational and

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scientific purposes to which the fund should be applied was ineffectual and void for indefiniteness and uncertainty. (*Prichard v. Thompson*, 95 N. Y. 76; *Holland v. Alcock*, 108 id. 312; *Read v. Williams*, 125 id. 560.)

The proposition on the part of the appellants is that by the thirty-fifth article the testator made two distinct alternative provisions for the disposition of the residue of his estate; that the one relating to the incorporation and endowment of the Tilden Trust was primary, and the other following it was ulterior and intended (if that institution was incorporated) to be made effectual in the event only that the executors and trustees deemed it inexpedient to apply such residue, or only a portion of it, to the Tilden Trust. On the contrary, the counsel for the respondents contend that there are no such separate alternative provisions in the article, but that the testator there provided for the disposition by the trustees of his residuary estate to charities, etc., of which the Tilden Trust was one of the objects, and that the power given to the executors and trustees was that of selection merely. In some cases it has seemingly been held that when words of a will expressing a class of beneficiaries or objects of a trust may be taken distributively, and some of them are lawful objects of the trust and others not, it may be effectual as to the former, but the weight of authority is otherwise, and in such case the power of mere selection, in execution of the trust attempted to be so given, is wholly void. (*Williams v. Kershaw*, 5 Cl. & Fin. 111; *Vezey v. Jamson*, 1 Sim. & Stu. 69; *Ellis v. Selby*, 1 My. & Craig, 286; *Mitford v. Reynolds*, 1 Phillips, 190; *In re Jarman's Estate*, 8 L. R. [Ch. Div.] 584; 25 Moak, 496.)

If that view, as applied to the present case, is supported, the conclusion must follow that the testator failed by his will to make any valid provision for the disposition of his residuary estate. Then the trusts and the power which the testator attempted to create and vest in his executors and trustees would constitute a single scheme for the appropriation of the fund by them to such charitable, educational and scientific pur-

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poses as they should choose to select. But a different question is presented if the provision relating to the creation and endowment of the Tilden Trust may be legitimately treated independently of that following it, by which he sought to make provision for such general undefined purposes. Then the effect of the former would not necessarily be embarrassed by any relation to the latter. (*Savage v. Burnham*, 17 N. Y. 561; *Schettler v. Smith*, 41 id. 328; *Manice v. Manice*, 43 id. 303; *Kennedy v. Hoy*, 105 id. 134.)

The disposition of this question depends upon the construction to which that article of the will may be entitled, having in view the principles applicable to the interpretation of such instruments.

As has already been seen, the first duty imposed upon the executors was to seek by legislative act the incorporation of the Tilden Trust. And it may be assumed that this was not required or designed as a useless ceremony. When that should be effected, they were authorized to organize the corporation, designate its first trustees and convey to it or apply to its use the residue of his estate, or so much of it as they should deem expedient. We need go no farther to see the purpose for which the Tilden Trust was intended in its relation to the fund. How is the purpose so represented necessarily qualified by any of the provisions following it? There were certain contingencies in view which would have the effect to defeat the execution of the power to endow such an institution, and upon which the limitation of the fund, or some portion of it, to the general, charitable, educational and scientific purposes was provided for. The first was the failure to obtain the incorporation of the Tilden Trust. In that event the testamentary disposition of the residue of the estate was dependent upon such provision for application to charitable, etc., purposes. But if it should be incorporated, the contingency depended upon the determination of the executors and trustees, to the effect that it was expedient to apply a portion only, or inexpedient to apply any part of the fund to that institution. It quite plainly appears that the testator intended that if legisla-

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tive action could be effectually had for that purpose, the Tilden Trust should be incorporated, and that being accomplished, its endowment should first be considered and determined; and that in the event only that it should by the trustees be deemed inexpedient to apply to it any of the residue of his estate, or expedient to apply to it less than the whole of such estate, would there be any occasion to seek other charitable, educational or scientific purposes to which to appropriate the fund or any portion of it.

It is urged that, because the gift of the testator is, by the terms of the will, made to the executors and trustees, their power is that of selection, and, consequently, there is no limitation created by the testator, and can be no primary or ulterior gift within the import of the language employed. But gifts may be made by a testator by means of powers vested in trustees to whom the estate is devised and bequeathed, and limitations contingent in character may be dependent upon the execution or non-execution by the trustees of powers conferred upon them. The question whether the provisions for the disposition of the residuary estate are or not alternative, primary and ulterior is one of construction. The fair interpretation of the language of the thirty-fifth article permits, and the evident intent of the testator as there manifested requires the conclusion that the two are alternative provisions, and that they are primary and ulterior. The former is definite in its object, the latter is otherwise.

It is true that by the terms of the thirty-ninth article the testator devised and bequeathed all of his residuary estate to the executors and trustees for the purposes mentioned in the will. This is designated at other places in his will as "general trust" to distinguish the residuary fund from the various special trusts created by the will. But this does not qualify or modify the construction to which the provisions of the thirty-fifth article would otherwise be entitled in the respect we are now considering them. The manner which the fund should be applied was dependent upon contingencies, some of which were within the powers vested in

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the executors and trustees. Yet the purpose of the devise and bequest must be considered in reference to the power conferred upon them by the provisions of that article, and in view of the manner which it might by virtue of those provisions be properly executed. The arbitrary exercise of power may characterize the effect which may be given to it, rather than its purpose. So in the present case the executors and trustees could have unfaithfully exercised their discretion upon the question of expediency. But while the test of expediency or in expediency was left to their discretion, they could not consistently with the intent of the testator, as plainly manifested by his will, have applied any part of the fund to the purposes of the general charity mentioned in such ulterior provision until they had in good faith determined for "some cause or reason" that it was inexpedient to apply it or some and what portion of it to the Tilden Trust.

And although the exercise of discretion may not be subject to judicial control or review, it may be said that for the purpose of interpretation, it is the intent of the donor so made to appear that properly measures the discretionary power of those who are to execute it, and not the opportunity for its unfaithful execution found in its discretionary character. The power vested in the executors and trustees was not that of mere selection of a beneficiary or beneficiaries amongst all the objects which were embraced within the scope and meaning of the thirty-fifth article; they were not authorized to reach the consideration of the undefined objects of charity, etc., there referred to for the purpose of selection from them until they had disposed of the question whether the specific beneficiary, the Tilden Trust, should or not be endowed. That was the definite object to which their attention was first to be directed, and the question of the application to it of the fund to be determined. This the trustees were to do before any matter of selection from amongst indefinite charities was reached. The scope of the inquiry for that purpose was to be extended to other objects "if for any cause or reason" they

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should deem it inexpedient to apply any part of the residuary fund or expedient to apply less than the whole of it to the Tilden Trust and not otherwise. This seems to have been the purpose the testator had in view as appears by the provisions of that article. This is not repugnant to any other provision of the will. And his intent as manifested by the language used must be effectuated if it can be consistently with the rules of law. (*Smith v. Bell*, 6 Peters, 68; *Wager v. Wager*, 96 N. Y. 164; *Roe v. Vingut*, 117 id. 204.)

The provision for the Tilden Trust must, therefore, be treated as primary and distinct from that for general charities, etc. And the question whether or not the former provision was effectually made remains to be considered. It is requisite to the validity of any provision of a will that it is or may become capable of lawful execution; and that test is applicable as of the time of the death of testator. There may be future contingencies provided for upon which gifts are made to depend; and beneficiaries may not be definitely known or ascertained at the time of the testator's death. It is sufficient that they are so described as to be ascertained in the future when the right accrues to receive the gift. (*Holmes v. Mead*, 52 N. Y. 332; *Shipman v. Rollins*, 98 id. 311.) And a devise or bequest may be limited to a corporation not in existence at the time of the death of the testator, provided it is created within the time allowed for vesting of future estates. This question was considered in *Inglis v. Sailors' Snug Harbour* (3 Peters, 99), *Ould v. Washington Hospital* (95 U. S. 303), and in this state it was so determined in *Burrill v. Boardman* (43 N. Y. 254), and reaffirmed in *Shipman v. Rollins* (98 N. Y. 328). In the *Burrill* case it was treated as in the nature of an executory devise dependent upon incorporation of the institution there contemplated, and it was held that the estate vested on the occurrence of that event. In that respect that case is distinguishable from the present one, as in the latter it was contemplated that the vesting should depend upon the conveyance to the Tilden Trust or application

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to its use by the executors and trustees to whom by the terms of the will the residuary estate was devised and bequeathed. This distinction arises out of the fact that upon the contingency which enabled the institution in the *Burrill* case to take the fund, the trust upon which the trustees held it terminated and there was no opportunity remaining for any limitation over, while it was otherwise in the case at bar. But treating the provisions of the thirty-fifth and thirty-ninth articles of the will as creating a trust power, it is not seen that the fact that the estate did not vest in the corporation on its creation necessarily has of itself any essential importance for the purpose of the question now under consideration provided the power was adequately given to convey or apply it to the use of the institution. While it could not in that case be deemed what was formerly known as an executory devise, it might in behalf of the Tilden Trust be treated as a conditional limitation of the estate, or a power dependent for its execution upon a condition. The testator evidently intended to vest in the executors and trustees all the control he could of the title to his residuary estate. But it cannot for the purposes of the question here be assumed that he intended their relation to it should be other than the legal effect of that which they took by the will. As to the realty no title passed to the trustees and no trust within the statute was created. When by the statute express trusts were reduced to those for the execution of which taking of the title was deemed essential (1 R. S. 728, § 55), it took from others none of the elements of trusts other than such as were dependent upon the title as formerly taken by trustees and none of the powers of execution not so dependent. And it was provided that when an express trust should thereafter be created for purposes other than those enumerated in section 55 no title should vest in the trustees, but if the trust directed or authorized the performance of any act which might lawfully be performed under a power it should be valid as a power in trust. (Id. 729, § 58.) If, therefore, the provisions of the thirty-fifth article of the will would, but for the statute have constituted a trust, and authorized the performance of any act

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which might lawfully be performed as such they, so far as related to the real property in the residuary estate of the testator, created a power in trust. And although the larger part of such estate was personalty and the trust as to that is not subject to the statute, the distinction in that respect for the purposes of the questions requiring consideration, need not be observed as the subject of powers is substantially applicable alike to both. (*Cutting v. Cutting*, 86 N. Y. 522; *Hutton v. Benkard*, 92 id. 295.)

It is urged that by the provisions in question the testator neither directed or authorized the performance of any act of disposition of the residuary estate which could lawfully be performed within the meaning of a statute defining a power in trust; and that there was not only no party to effectually demand their execution, but they had no enforceable character. It is true the creation of a trust depends upon the nature of the provisions by which its creation is sought. It is also the rule that a trust is imperative, and at common law the same rule is applicable to a power coupled with a trust although otherwise as to a naked power. (2 Story Eq. Jur. § 1061.) The primary one of those provisions certainly was not enforceable at the time of the death of the testator. There was then no Tilden Trust, and its then future existence was contingent. When it was created its ability to take depended upon its incorporation being in form and manner satisfactory to the executors and trustees, and that being so, it was made discretionary with them whether the institution should have the whole or any and what portion of the residuary fund. It would, therefore, seem to follow that upon the incorporation of the Tilden Trust it could not, without action of the trustees, have enforced conveyance or application to it or the fund or any portion of it. In that view and upon the construction given to the thirty-fifth article, the question is whether the trustees were enabled to vest the fund in the Tilden Trust, or by the exercise of the discretionary power given to them, could have afforded to that institution the right to demand and enforce in that respect the execution of the provision of the

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will in its behalf. As already seen, the testator did not intend to die intestate as to any portion of his property, and that he did intend to impose upon his executors and trustees the imperative trust power for the disposition of his residuary estate, appears by the provisions of the thirty-ninth article, by which he directed them "to apply the same and the proceeds thereof to the objects and purposes mentioned" in the will. This is borne out by the terms of the thirty-fifth article by imputing to him the understanding that the secondary provision of that article was valid, as upon the contingency there mentioned he provided for the disposition of it. If the primary provision was of itself valid in its object, purpose and effect, it was not invalidated by the fact that the trustees were in terms in the event stated in the article, empowered to apply the fund to the indefinite purposes mentioned in the ulterior provision for which testamentary disposition of property could not lawfully be made. (*Attorney-General v. Lonsdale*, 1 Sim. 105; *Salisbury v. Denton*, 3 Kay & J. 529; *Carter v. Green*, id. 591.)

In other words, the limitation to the indefinite objects did not deny to the former provision for the Tilden Trust the effect to which it otherwise may have been entitled. (*Savage v. Burnham*, 17 N. Y. 561; *Kennedy v. Hoy*, 105 id. 134.)

In such case the subject would be within the control of the court, and on proper application it would restrain the use of power for such unlawful purpose. The contention of the respondents' counsel is that it was essential to the validity of the provision in behalf of the Tilden Trust that the residuary estate should have vested in it at the time it came into corporate existence, or that the institution should then have been entitled to demand and enforce by decree of the court the conveyance to it or the application to its use of the fund by the trustees. This proposition (upon the construction here given to the provisions in question) in effect seems to be that a trust or trust power could not exist with or survive the intervention of the discretionary power which the testator intended to

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give the trustees. But it may be observed that while a valid trust is imperative, attending it may be powers upon which limitations and executory bequests may be contingent, and the exercise of those powers may be discretionary. (*Hawley v. James*, 5 Paige, 318, 468; 16 Wend. 61, 176; *Mason v. Jones*, 4 Sandf. Ch. 623; 13 Barb. 461; *Costabadie v. Costabadie*, 6 Hare, 410; *French v. Davidson*, 3 Madd. 396; *Walker v. Walker*, 5 id. 424; *Cole v. Wade*, 16 Ves. 27.)

It is very likely that if the testator had apprehended the invalidity of the ulterior provision of the thirty-fifth article he would have provided a different limitation in the event there mentioned. But it cannot be assumed that the primary provision for the appointment and disposition of the residuary estate to the Tilden Trust would have been other than that which he made. The efficiency of the power given by this provision is not dependent upon the character of the ultimate limitation, nor is it less effectual than it would have been if that had been to a lawful object of testamentary gift. The difference is that in the one case it was within the power of the trustees to defeat the disposition by the will of the residuary estate, and in the other they could not. But in the latter case they, by the execution of the discretionary power, could have rendered the ultimate provision ineffectual, and for the purposes of the disposition of the fund inoperative. And, therefore, unless the contingency arose upon which the ultimate limitation of it was dependent, it would not be important for any practical purpose whether it was valid or not, and in that event only, would an enforceable character of the trust or trust power be essential to effectuate the intent of the testator. His purpose, it must be assumed in view of the power given, would be accomplished by the disposition to the incorporated institution designated by him. The creation of this power in nature and purpose was lawful, and through its execution the gift to the Tilden Trust could legitimately be effected, although in respect to the appointment to that institution it was made dependent upon the will of the executors and trustees. While

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it is essential to a trust as such that it be imperative and, therefore, enforceable by decree in equity when the time arrives for its execution, it is not so of a mere power or necessarily so of a trust power, although the latter is imperative unless its execution or non-execution is made expressly to depend upon the will of the grantee or donee. The testator intended to make the execution of the power of appointment to the Tilden Trust dependent upon the will of the trustees as expressly appears by the provision creating it. The contention, therefore, that this power of the primary provision was invalid because its execution was not judicially enforceable in equity on behalf of that institution does not in the view taken seem to be maintained. The imperative character intended by the testator to be made applicable and in a certain event to be applied to the disposition of the residuary estate, had relation to the ultimate limitation, which was dependent upon the contingency that the trustees should deem it inexpedient to appoint to the Tilden Trust any or only a portion of such fund. And as such limitation was invalid for indefiniteness and uncertainty in its object, the testator failed by it to effectually make any imperative provision for the disposition of the residuary estate by means of a trust, power in trust or trust power enforceable as such except so far as should be necessary to make and keep good the special trusts as directed.

And as the will furnished no support for an ultimate limitation of the fund in the event the trustees should have deemed the execution of the power of appointment to the Tilden Trust inexpedient, the real property within the residuary estate descended to the heirs of the testator subject to the execution of the power of appointment and disposition to that institution, and the right of his next of kin to the administration in their behalf of the personalty of such estate was subject to the execution of the same power.

Now, by reference again to the provisions of the thirty-fifth article, it may be seen, as plainly appears by their terms, that the testator intended that the trustees should exercise the power conferred upon them to consummate the disposition of

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the residuary estate for the declared purposes of the trust. If they were successful in their effort to obtain the corporate charter it was their duty to determine whether it was satisfactory, and in the event it was so, then, unless they deemed it inexpedient to apply any part of the fund to the Tilden Trust, the further duty was imposed upon them to determine whether it should take all of it and if not all, to appoint the amount of it so to be appropriated. It is apparent that the testator intended to make the exercise of such power a duty and essentially so to carry out his declared purpose. The discretion which he evidently intended to give the trustees related not to the execution of the power, but only to the manner of its execution. In that view (which seems well supported) may not the limitation to the Tilden Trust have been lawfully conditional not only on its incorporation, but as well upon the manner such preliminary power, discretionary only in that respect, should be executed.

In *Ould v. Washington Hospital* (95 U. S. 303), the estate for the purposes of the trust was devised to trustees with a view to the incorporation after the death of the testator of an institution to which they, in that event, were to convey the estate provided the corporation was approved by them, otherwise not. The hospital was incorporated and conveyance made to it by the trustees. The validity of the trust was contested, and the court held that the provision relating to a conveyance upon the creation of a corporation approved by the trustees was a conditional limitation of the estate vested in them. In that was involved the discretionary power of the trustees relating to the approval of the corporation. It is essential that the object and subject of a testamentary dispositional provision be definite and when so designated that they are or may become such and properly be ascertained, a limitation may by the testator be made to depend upon a future condition having regard to the statute of perpetuities, and such condition may consist of a power resting in the discretion of a trustee provided for and defined by the will; and when the condition is fulfilled the limitation may be enforced.

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The doctrine of the common law on the subject of powers of appointment and selection, except so far as it permitted the treatment of them as illusory, is consistent with the statute relating to powers, which provides that "a power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner, granting or reserving such power, might himself lawfully perform." (1 R. S. 732, § 74.) The powers now under consideration are a special power, and a special power in trust which, as defined by the statute, are those where the persons, or class of persons, to whom the disposition of lands is to be made under the power are designated (Id. § 78); and "(1) when the disposition which it authorizes is limited to be made to any person or class of persons other than the grantee of such power, entitled to the proceeds, or any portion of the proceeds or other benefit to result from the execution of the power; (2) when any person or class of persons other than the grantee is designated as entitled to any benefit from the disposition or charge authorized by the power." (Id. 734, § 95.)

The provisions of the thirty-fifth article of the will *in terms*, in view of those of the thirty-ninth article, created a special power in trust; and because the testator intended that his residuary estate should be disposed of as directed by his will for the purposes of the trusts there mentioned, the provisions were apparently imperative; such, at all events, would have been their effect if the ulterior disposition to which the estate was conditionally limited had been valid.

And the statute provides that "every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative and imposes a duty on the grantee, the performance of which may be compelled in equity, for the benefit of the parties interested." (Id. 734, § 96.) The ultimate limitation was by the terms of the will imperative in the event that the trustees failed for any cause to dispose of the fund under the primary one, which alone was made dependent upon their discretionary power. The Tilden Trust could take only through the power in the nature of that

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of appointment vested in the trustees; and the fact that the exercise of that power was discretionary and could not be enforced, produced no legal infirmity in the provision relating to that institution, its ability to take, and to the limitation to it dependent upon such appointment. (*Chatteris v. Young*, 6 Madd. 30; *Lancashire v. Lancashire*, 1 DeG. & Sm. 288; 2 Phillips, 657; *Cole v. Wade*, 16 Ves. 27; Perry on Trusts, § 508; Hill on Trustees, 490-492.)

So far as the statute relates to the subject of the power of appointment, it provides that where under a power a disposition is directed to be made amongst several designated persons without specification of the share to be allotted to each, all of them shall be entitled in equal proportion. (1 R. S. 734, § 98.) But when the terms of the power import that the fund is to be distributed between them in such manner or proportions as the trustee may think proper, he may allot the whole to any one or more of such persons in exclusion of the other. (Id. § 99.) The trust power in such case does not cease to be imperative. (Id. § 97.) And if the trustee having such power shall die leaving it unexecuted, its execution shall be decreed in equity for the benefit equally of all the persons so designated. (Id. § 100.) These provisions of the statute are in that respect substantially declaratory of the common law. (*Swift v. Gregson*, 1 T. R. 432.) It was there, as it is by our statute, a trust power. And it is not important for the purposes of the question whether the designated persons are vested with the fund subject to the execution of the power, or take by reason of the power given. In the one case there is a gift expressed and in the other implied, which will be executed by decree of the court in default of execution of the power by the donee of it. (1 Perry on Trusts, § 250; *Walsh v. Wallinger*, 2 Russ. & Myl. 78; *Lees v. Whiteley*, L. R. [2 Eq.] 143.)

No such implication arises where there is a limitation over of the estate or fund to other objects in default of the execution of the power by the donee; and in that case the objects of the power take nothing as their beneficial interest, or the limitation to them is wholly dependent upon the execution of

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the power by him. (*Davidson v. Proctor*, 19 L. J. [N. S. Ch.] 395; 14 Jur. 31; *Pearce v. Vincent*, 2 Myl. & K. 800; 2 Bing. [N. C.] 328; 2 Keen, 230; *Goldring v. Inwood*, 3 Giffard, 139.) And although the power of appointment and selection rests in the discretion of the trustee, it is valid and may be effectually executed by him. (2 Perry on Trusts, § 508; *Brown v. Higgs*, 8 Ves. 561.)

In the present case the provision relating to the Tilden Trust conferred upon the trustees a power of appointment and disposition to a definite object with a limitation over on default of such appointment; and so far as by the terms of such provision the execution of the power was left to the judgment or discretion of the trustees, it was expressly made to depend on their will within the meaning of the statute. And as before remarked, the apparent purpose and effect of this provision was not qualified or defeated by the fact that the ultimate limitation was to objects so indefinite as to render it ineffectual. In practical effect it was the same as if the fund had been limited over to the heirs and next of kin of the testator as they necessarily would take in default of the execution of the power.

In *Power v. Cassidy* (79 N. Y. 602) the fund was bequeathed to the executors with power of appointment and selection among a designated class of beneficiaries. While the manner of executing it was discretionary the trust or trust power was imperative, and on default of the executors to execute it the power would survive them, and the designated objects would then and ultimately be entitled to share equally in the fund and it would be enforced accordingly. But as to those beneficiaries it would not in that sense and for that purpose have been imperative if there had been a limitation over to other objects on such default, although as to the latter it would have retained its imperative character. Yet the power thus given of appointment would have been valid and may have been effectually executed.

It is essential to the constitution of a valid trust or special power in trust by a testator that the objects be so designated

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or described that they may be definitely known or ascertained from the provisions of his will. And it was the failure of the testators to so designate or define the objects of the attempted trusts which came to the attention of the court and were for that reason held invalid in *Prichard v. Thompson* (95 N. Y. 76); *Holland v. Alcock* (108 id. 312); *Read v. Williams*, (125 id. 560). In those cases the trust power sought to be given was that of appointment and selection without limitation over. The infirmity which rendered invalid the provisions of the wills in question in those cases was that no beneficiary was designated or pointed out by or ascertainable from the will having any interest in the execution of the power or who could assert in court any claim founded upon the trust. Those provisions of the wills were, therefore, held invalid for indefiniteness of the classes of objects of the trusts sought to be created. And in this respect they were distinguished from *Power v. Cassidy*. The present case is distinguishable from them in like manner, and further that the power given by the primary provision in question was not that of appointment and selection among members of a class, but was of appointment and disposition to a definitely designated beneficiary. It is also essential that the subject of the power be designated and certain or that the means be provided by the will to render it properly ascertainable or certain. The provision of the power in that respect is for the application to the Tilden Trust of the residue of the estate or so much of it as the trustees should deem expedient. The cases before cited recognizing as effectual discretionary power given to trustees to regulate, control or determine the amount which certain beneficiaries should receive of specific funds, to be exercised in reference to circumstances which the donors of the power had in view, have some bearing upon this question. Those are the *Hawley*, *Mason*, *Costabadie*, *French*, *Walker* and *Cole* cases (*supra*).

The residuary estate was a definite fund, and unless the trustees determined that it was inexpedient to endow the Tilden Trust, they were at liberty to apply to it the entire

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fund, but whether expedient to so apply all or less than the whole of it was a matter of judgment of the trustees to be founded upon the amount of the residue in reference to the sum suitably available for the purpose of the institution, and that was the amount the testator authorized the trustees to appoint to the institution. This was the means provided by the will to make certain that which until such action by the trustees was uncertain.

In *Peck v. Halsey* (2 P. Wms. 387) it was held that a bequest by the testatrix of *some* of her best linen to A. was void for uncertainty, but that a bequest of *such* of her best linen as the executor should think fit or as the legatee should choose, would have been good.

In *Kennedy v. Kennedy* (10 Hare, 438) the testator gave all his household furniture, etc., to trustees and directed that all his household property be sold by them except such articles as his wife should desire to retain and which he authorized her to appropriate to her own use. Held, that the power of selection was effectually given to the wife. And *Arthur v. Mackinnon* (L. R. [11 Ch. Div.] 385) is to the same effect. It has been seen by reference to the statute that the power of appropriation of a fund among the members of a class may be created and the donee of the power be authorized in his discretion to appropriate it in such proportions as he may please. This was so at common law. When the fund is definitely designated it would seem that power may be conferred upon the donee of the power to determine what portion of it may be appointed to a definite beneficiary designated by the donor.

Our attention has been called to no authority to the contrary of that proposition in its application to the present case. The *Prichard*, *Holland* and *Read* cases do not have any necessary application to the question. The reasoning there was had in reference to their contexts to which it was very apt. And the relief of the provision relating to the Tilden Trust from the alternative ulterior provision which embraces only indefinite objects, denies to those cases any practical application to the questions presented in the case at bar.

Dissenting opinion, per BRADLEY, J.

While the statute abolished powers as they before then existed (1 R. S. 732, § 73) it, as said by Judge ANDREWS in *Read v. Williams*, “does not define all the purposes for which a power over property may be created.” This appears by section 74, before referred to and by the revisers’ notes (3 R. S. [2d ed.] 590), as to powers other than those which are designated as beneficial. They, except as there enumerated, were abrogated by the statute. (1 R. S. 733, § 92.) Treating that in question as a trust power, those considerations of the statute may not be essentially important here. It must be assumed that the testator, through powers conferred on his trustees by the thirty-fifth article; intended to dispose of his entire residuary estate and, therefore, its ultimate dispositional provision (in view of article thirty-nine) was intended, as by its terms it purported to be imperative, but that character was not unconditionally applicable to the power of appointment and disposition in the primary provision relating to the Tilden Trust. It had relation to the limitation over to the objects of the ulterior provision, and in consequence of the invalidity of the latter his intention, if the trustees had failed to appoint the Tilden Trust as the beneficiary, would have been disappointed. The purpose of the appointment and disposition to that institution is apparently legal and, at common law, may have lawfully been accomplished through the execution of a power in the manner the testator sought by his will to do it. It also fairly comes within the purposes for which a power as defined by the statute may be employed. (*Id.* § 74.) At common law a trust may have been attended with a discretionary power, upon the non-execution of which the enforceable character of its ultimate limitation might be dependent. This relation of powers, to which trusts may have been subjected, was preserved and provided for by the statute. And while a trust power is in its nature imperative, that character of it in the sense of being enforceable may, when its execution or non-execution is made expressly to depend upon the will of the donee, be suspended by and during the existence of such discretionary power or determined by its execution. In the

Dissenting opinion, per BRADLEY, J.

present case there was involved in the provision for the Tilden Trust a power in its terms discretionary, and so far as it was so, its execution or non-execution was made expressly to depend on the will of the trustees, and the purpose being lawful it was valid unless in contravention of the statute against perpetuities. It is urged that the limitation provided for by the thirty-fifth article of the will would permit the unlawful suspension of the absolute power of alienation of the realty and of the absolute ownership of the personal property constituting the residuary estate of the testator. (1 R. S. 723, § 15; Id. 773, § 1.) This would be so and its effect the invalidity of the limitation if such suspension would not, by the terms of the will, necessarily terminate within a period not longer than the continuance of the life of the survivor of the two persons there designated. (*Schettler v. Smith*, 41 N. Y. 328.) But the thirty-fifth article must be construed in connection with the thirty-ninth article, and by the latter the testator directed that the executors and trustees "possess, hold, manage and take care" of the residuary estate during a period not exceeding such two lives. This, in view of the further direction that they apply such estate to the objects and purposes mentioned in the will, which was imperative, is not consistent with the suspension of the absolute power of alienation of the real estate and of the absolute ownership of the personal property beyond that period. It, therefore, seems that the future estates sought to be created by the testator were so limited that by the terms of those provisions they would necessarily and beyond any contingency have terminated within the period prescribed for that purpose by the statute, and in that respect they may be upheld.

These views lead to the conclusion that the provisions of the will relating to the Tilden Trust and the powers for their execution given to the executors and trustees were valid, and as the consequence the main purpose of the action must fail.

Since the commencement of the action, and upon the application of the executors and trustees, a Tilden Trust has been incorporated in form and manner satisfactory to them and

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organized. They determined to endow it with the entire residuary estate, and made to the institution conveyance and transfer accordingly, subject to provisions contingently made in the will by the testator in behalf of special trusts by him created and as there directed.

It is insisted that the act of incorporation is not such as was intended by the testator, in that it was not given the corporate capacity designed by him. By the will he requested them to obtain "an act of incorporation of an institution to be known as the Tilden Trust, with capacity to establish and maintain a free library and reading-room in the city of New York and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number, and in case said institution be incorporated * * * I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof," etc. In the preamble of the act of incorporation it is stated that the "executors and trustees deem it inexpedient to designate any purposes of the corporation * * * other than the establishment and maintenance of a free library and reading-room in the city of New York in accordance with the purpose and intention of the said testator," and such was the capacity given by the act to the corporation. The first section provided that the three persons (naming them), who were the executors and trustees, and such other persons as they should associate with themselves and their successors, were created a body corporate under the name and title of the Tilden Trust; and by the second section it was provided that those three persons should be permanent trustees of such corporation, and that they designate and appoint other trustees so that the number should not be less than five.

The testator seems to have had in view only one definite purpose of the corporation. That he expressed. Beyond the establishment and maintenance of a free library and reading-room he contemplated that the promotion of some further

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scientific and educational objects might suitably and properly be added and sustained. He, therefore, provided that the corporate capacity be adapted to such objects in that respect as the executors and trustees should designate. This, however, would be dependent upon circumstances to be determined by them and he left it to their discretion. He evidently did not intend that the corporation, for the purpose by him definitely appointed, should be frustrated by the failure of the executors and trustees to exercise their discretion in such manner as to give occasion to amplify the corporate capacity of the institution. The question whether, after the creation of the corporation for the free library and reading-room, the executors and trustees may by the designation of such further objects authorize the enlargement of its capacity accordingly, does not now arise and is not considered.

We think the incorporation was not invalidated by the manner the capacity of the institution was defined in the act.

When the plaintiff commenced this action it may have had support in the invalidity of the ulterior provision of the thirty-fifth article of the will to prevent the application of any portion of the estate to the indefinite objects and purposes there mentioned. But as the executors and trustees afterwards made a determination which would prevent the application of any part of the fund to those objects and purposes no relief in that respect is now essential, and the only purpose for which further consideration need be given to that subject has relation to the question of costs which we think should, on behalf of the several parties, be chargeable to the estate of the testator.

The judgments of the court below should, therefore, be reversed and the complaint dismissed with costs in that and this court to all the parties, appellants and respondents, payable out of the estate.

All concur with BROWN, J., except POTTER and VANN, JJ., who concur with BRADLEY, J.

Judgment affirmed.

Statement of case.

130 88
148 556

HARRIET S. RUMSEY et al., Respondents, v. THE NEW YORK
AND NEW ENGLAND RAILROAD COMPANY, Appellant.

It seems that under the provisions of the act of 1842 (Chap. 306, Laws of 1842), requiring the secretary of state when an act as published in the session laws is certified "as having been passed by the assent of two-thirds of the members elected to each house" to state in connection with it as published in the Session Laws that it was passed "by a two-thirds vote" and that this statement shall be presumptive evidence that the bill was certified as having been so passed, the presumption thus created may be overcome by the production of the original certificate showing it was not so passed.

But while under the Revised Statutes (1 R. S. 156, § 3), no act shall be deemed to have been passed by a two-thirds vote unless so certified by the presiding officer of each house, a defective certificate which fails to state either way *i. e.*, as to whether or not the act was passed by a two-thirds vote, is not conclusive to overcome the presumption created by the statement of the secretary in the Session Laws.

In such case the journal of the house whose presiding officer has made the defective certificate may be resorted to for the purpose of determining the fact.

It seems it would not be proper to go back of the certificate, if in due form, for the purpose of impeaching it.

The act of 1850 (Chap. 283, Laws of 1850), which empowers the commissioners of the land office to grant to the proprietors of adjacent lands "so much of the lands under the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this state or proper for the purpose of beneficial enjoyment of the same by the adjacent owner" is one requiring the assent of two-thirds of the members of both houses of the legislature. (State Const. art. 1, § 9; 1 R. S. 156, § 2.)

The legislature had authority to confer such power upon the said commissioners. (Const. art. 5, §§ 5, 6.)

As to whether the federal government can interfere with the right of the state to control and dispose of low flat lands covered with shallow water outside the navigable channel of a river, *quære*.

Where the Federal Government has not complained of such a grant and where it does not operate to interfere with navigation, no other party may be heard to complain.

The provision of the General Railroad Act of 1890 (Chap. 565, Laws of 1890) authorizing a railroad corporation to construct its road across or along any stream or water-course and removing the exception in the similar provision of the act of 1850 (Chap. 140, Laws of 1850), of the right to obstruct any navigable stream or lake, has no effect upon a patent for

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lands under the waters of a navigable stream issued by the state prior to the passage of said act of 1850, and so, does not divest the patentee of any rights acquired under his patent.

Reported upon a former appeal, 114 N. Y. 423.

(Argued October 14, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1889, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

W. C. Anthony for appellant. The plaintiffs must prevail, if at all, on the strength of their own title. As to that portion of the lands in question which were granted to the New York Central and Hudson River Railroad Company prior to plaintiffs' grant the latter have no title. (Laws of 1850, chap. 140, §§ 25, 49; Laws of 1881, chap. 625.) The plaintiffs have no valid title to any portion of the land described in the complaint. Their water grant is void. (Laws of 1850, chap. 283; Cooley on Const. Lim. § 117; *Barto v. Himrod*, 8 N. Y. 483; *People v. Ins. Co.*, 92 id. 315; *State v. Hayes*, 61 N. H. 264; State Const. Art. 1, § 9; *People v. Comrs., etc.*, 54 N. Y. 276; *People v. Allen*, 42 id. 378; *Martin v. Waddell*, 16 Pet. 410; *McCready v. Virginia*, 94 U. S. 391; *Hoboken v. P. R. R. Co.*, 124 id. 656; *Stockton v. N. Y. & B. R. R. Co.*, 32 Fed. Rep. 19; *Hill v. U. S.*, 39 id. 172; *Wilson v. B. C., etc., Co.*, 2 Pet. 245; *Gibbons v. Ogden*, 9 Wheat. 1.) The General Railroad Act (Chap. 140, Laws of 1850, as amended by subd. 4, § 4, chap. 565, Laws of 1890), authorized this railroad to be constructed between the termini designated in its certificate, and "across, along or upon any stream or water-course which the route of the road should intersect or touch," not excluding navigable streams. (*Bridge Co. v. R. R. Co.*, 6 Paige, 554; *People v. R. & S. R. R. Co.*, 15 Wend. 114.) The ultimate

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control of the lands in question rests with the congress of the United States. (*South Carolina v. Georgia*, 93 U. S. 4; U. S. R. S. §§ 3964, 5263.)

H. H. Hustis for respondent. Chapter 283 of the Laws of 1850, entitled "An act to amend the Revised Statutes relating to grants of land under water," passed April 10, 1850, is valid. (*People v. Purdy*, 2 Hill, 34; *Purdy v. People*, 4 id. 384; *People v. Devlin*, 33 N. Y. 280; *People v. Purdy*, 54 id. 276.)

HAIGHT, J. This action was brought to restrain the defendant from operating its railroad upon lands claimed to belong to the plaintiffs.

The defendant's road at the village of Fishkill Landing was constructed in the year 1881, in the Hudson river upon lands under water in front of uplands owned by the plaintiffs. On the 3d day of March, 1885, the governor of the state, pursuant to a resolution of the commissioners of the land office, issued to the plaintiffs a patent of the lands under water in the Hudson river in front of their uplands, being about one thousand feet on the shore line and along the bank of the river, and about two thousand feet from high-water mark to the channel bank of the river, excepting therefrom the rights of the New York Central and Hudson River Railroad Company.

It is contended that the plaintiffs obtained no valid title to the lands under water by reason of this patent for the reason that it was issued under and pursuant to chapter 283 of the Laws of 1850, which act provides for the appropriation of public property to a private use, and because it is not certified to have passed the assembly by a two-thirds vote.

The act provides that: "The commissioners of the land office shall have power to grant in perpetuity or otherwise so much of the lands under the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this state, or proper for the purpose of beneficial enjoyment of the same by the adjacent owner, but no such grant shall be made to any person other than the proprietor of the adjacent

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lands, and any such grant that shall be made to any other person shall be void."

No question is made but that the certificate of the presiding officer of the senate is in due form.

That of the assembly is as follows:

"STATE OF NEW YORK.

"IN ASSEMBLY — *April* 10, 1850.

"This bill was read the third time and passed, two-thirds of all the members elected to the assembly being present on its final passage.

"By order of the assembly.

"F. C. DININNY.

"*Speaker pro tem.*"

The statute provides that the assent of two-thirds of the members elected to each branch of the legislature is requisite to every bill appropriating the public moneys or property for local or private purposes; and no bill shall be deemed to have passed by the assent of two-thirds of the members elected to each house, unless so certified by the presiding officer of each house. (1 R. S. [7th ed.] 432, §§ 2, 3.)

The act in question is doubtless one which required the assent of two-thirds of the members elected to each branch of the legislature, and the certificate of the presiding officer of the assembly is defective in not showing whether it received the assent of a majority or two-thirds of the members elected.

The act as published in the Session Laws states that it was by a two-thirds vote. This statement is made in accordance with the provisions of chapter 306 of the Laws of 1842, which makes the same presumptive evidence that the bill was certified by the presiding officers as having been passed by the assent of two-thirds of the members elected to each house. This presumption, however, may doubtless be overcome by the production of the original certificate. The certificate produced, however, does not state that it was not passed by a two-thirds vote. It merely states that it was passed; that the two-thirds of the members elected to the assembly were pres-

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ent. The certificate, therefore, independent of the statute referred to, would not overcome the presumption created by the statement appearing in the Session Laws. Under the statute the act shall not be deemed to have been passed by the assent of two-thirds, unless the presiding officer so certifies, but this statute evidently contemplates that the certificate be made in due form, free from defects and clerical errors. Such a certificate would doubtless be conclusive; but to hold that a defective certificate, one that fails to state the fact either way, is under the statute conclusive and overcomes the presumption created by the statement appearing in the Session Laws, is giving the statute an interpretation which we think was never intended. May we, under these circumstances, look at the journal of the assembly for the purpose of determining the fact?

In the case of *People v. Purdy* (2 Hill, 31–34), BRONSON, J., in delivering the opinion of the court said: “It has not been denied that the judicial tribunals of the state may in some way look behind the printed statute book for the purpose of ascertaining whether bills coming within the two-thirds clause of the Constitution have received the requisite number of votes, and although I have felt a good deal of difficulty on that question I am inclined to the opinion that such an inquiry may be instituted. The question is no doubt one of great delicacy but if the courts have the right to entertain it the duty is imperative and we are not at liberty to shrink from its performance.”

These views were approved by the Court of Errors on the review of the case. (4 Hill, 384.)

And to the same effect is the case of *People ex rel. Purdy v. Commissioner of Highways of the Town of Marlborough* (54 N. Y. 276).

It is quite possible, however, that the courts would not be justified in going back of the original act on file in the secretary of state's office, and the certificates thereto attached, for the purpose of impeaching them. (*People v. Devlin*, 33 N. Y. 269.)

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But in this case, as we have seen, the certificate of the presiding officer of the assembly is not in due form. It shows that the bill was passed, but not whether it was passed by a majority or a two-thirds vote. The omission to state that fact was evidently a clerical error, and under these circumstances we are inclined to the opinion that we may look back to the journal for the purpose of ascertaining the fact.

Upon an inspection of the journal of the assembly for 1850, volume 1, page 1268, it appears that the act in question was passed unanimously by the assembly; 101 votes in the affirmative and none against it, more than two-thirds of all the members voting therefor.

It is claimed that the act of 1850 contravenes the Constitution because it tends to delegate the powers and functions of the legislature. As we have seen the act gives to the commissioners of the land office the power to grant lands under the waters of navigable rivers or lakes to promote the commerce of the state or for the purpose of beneficial enjoyment by the adjacent owner.

The Constitution provides that the lieutenant-governor, speaker of the assembly, secretary of state, comptroller, treasurer, attorney-general and state engineer and surveyor shall be the commissioners of the land office, and that their powers and duties "shall be such as now are or hereafter may be prescribed by law." (Const. art. 5, §§ 5, 6.)

This appears to give to the legislature in express terms the authority to prescribe the powers and duties of the commissioners of the land office, which has been done by the act in question.

It is also claimed that the state holds a qualified title to the lands under the waters of navigable rivers open to the sea, and that it has no right to appropriate them to a private use inconsistent with that of the people of the United States for the purpose of commerce and navigation. Suppose this to be so. The United States, however, is not here complaining of any encroachment upon the rights of interstate commerce, and there is no pretense that the grant in question operates to

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interfere with the navigation of the river. Under the findings of the trial court the grant only extends to the channel bank of the river and it could not, therefore, well interfere with the navigation thereof, even though the land granted should be covered with buildings. We do not understand that the United States has ever made any claim to the low, flat lands covered with shallow water outside of the deep channel of navigable rivers, or that it has interfered with the right of the state to control and dispose of the same. (*Willson v. Black Bird Creek Marsh Company*, 2 Peters 245; *Kerr v. West Shore Railroad Company*, 37 N. Y. St. Rep. 913-916.)

Chapter 140 of the Laws of 1850, which gave to railroad corporations the right to construct their roads across, along or upon any stream of water, water-course, street, highway, plank-road, turnpike or canal excepts from the provisions of the act the right to obstruct any navigable stream or lake.

Chapter 565 of the Laws of 1890, removing such exception was passed since the patent was issued by the state to the plaintiffs herein, and that act consequently could not divest the plaintiffs of any previously acquired rights to the lands in question.

This case has already been considered in this court upon a former appeal (114 N. Y. 423), in which the questions not herein considered were disposed of. (See also same parties, 125 N. Y. 681; 34 N. Y. St. Rep. 454.)

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

BYAM K. STEVENS, Respondent, v. THE NEW YORK ELEVATED
RAILROAD COMPANY et al., Appellants.

In an action to recover damages for injuries to plaintiff's premises caused by the construction and maintenance of an elevated railroad on a street in front thereof, it appeared that the premises in question extended from said street to another street in the rear and were covered by a single brick building. Formerly it consisted of two lots, having different owners; they were conveyed to one person in 1825, before defendants' road was authorized to be built, and since then have been conveyed and occupied as one lot. There was no evidence that portions of the premises fronting on each street were occupied separately. *Held*, that plaintiff was, as abutting owner, entitled to recover his damages for injuries to the whole premises considered as a single lot; that while the fact that the premises were accessible to persons, property, light and air from both streets was important as bearing on the extent of the injuries, it did not preclude the recovery of any damages for injuries to that portion on another street.

Mooney v. N. Y. E. R. R. Co. (30 N. Y. S. R. 561), distinguished.

Greenwood v. Met. E. R. Co. (26 J. & S. 482), distinguished and disapproved.

(Argued October 19, 1891; decided October 30, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 6, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

J. C. Thomson for appellants. The court erred in refusing to dismiss the complaint as to the premises No. 100 Water street, and in receiving evidence as to the depreciation in the rental and fee value of the same. (*Greenwood v. M. E. R. Co.*, 26 J. & S. 482; *C. B. U. P. R. Co. v. Andrews*, 30 Kans. 290; *Rude v. City of St. Louis*, 93 Mo. 408; *Gilbert v. G. S. L. & P. R. Co.*, 13 Col. 501; *Paquet v. M. T. S. R. Co.*, 18 Ore. 233; *Story v. N. Y. E. R. R. Co.*, 90 N. Y. 122; *Clark v. Dillon*, 97 id. 370; *Coffin v. Reynolds*, 37 id.

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640; Code Civ. Pro. § 499; *Pope v. T. H. C. & M. Co.*, 107 N. Y. 61, 66; *Tooker v. Arnoux*, 76 id. 397, 400; *Southwick v. F. Nat. Bank*, 84 id. 420; *Jarvis v. Palmer*, 11 Paige, 650; *Gould v. Glass*, 19 Barb. 179; *Woodburn v. Chamberlin*, 17 id. 446; *McIntosh v. Ensign*, 27 N. Y. 169, 175; *Fielden v. Lahens*, 6 Abb. Pr. [N. S.] 341; 2 Abb. Ct. App. Dec. 111; *Summerlin v. F. S. M. & M. Co.*, 41 Fed. Rep. 249; *Ahern v. McGeary*, 79 Cal. 44; *M. G. L. Co. v. M. & E. R. Co.*, 86 Ala. 372; *Smith v. Cross*, 90 N. Y. 549; *Sanford v. Ellithorp*, 95 id. 48; *Carroll v. Deimel*, Id. 252; *Holcomb v. Holcomb*, Id. 316; *Marsh v. McNaier*, 99 id. 174; *Nugent v. Jacobs*, 103 id. 125; *Varnum v. Hart*, 14 N. Y. S. R. 140, 147; *Doty v. Stanton*, 18 id. 427; *Palmer v. Davis*, 28 N. Y. 242; *Simar v. Canaday*, 53 id. 298; *Lammond v. Volans*, 14 Hun. 263, 266; *Simpson v. Blunt*, 42 Mo. 542; *Barthing v. Jamison*, 44 id. 141; *State ex rel. v. Adams*, 84 id. 310; 12 Mo. App. 436; *Wight v. M. P. R. Co.*, 20 id. 481; *Doyle v. Jones*, 8 Abb. Pr. [N. S.] 383; *Ayrault v. Sackett*, 17 How. Pr. 461; *Packer v. French*, Lalor's Supp. 103; *Dugied v. Ogilvie*, 1 Abb. Pr. 145; *Cleveland v. Hunter*, 1 Wend. 104; *Putnam v. Crombie*, 34 Barb. 232.)

G. Willett Van Nest for respondent. The whole lot has been a single lot since 1829. The abutting owner of such a lot has easements in the street and a right to have it used only for street uses. (*Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 185; *Abendroth v. M. E. R. Co.*, 122 id. 12; *Tallman v. M. E. R. Co.*, 121 id. 119.) Plaintiff should recover for damage to the whole lot. (*Wiggins v. Cleary*, 49 N. Y. 348; *Richie v. Henlings*, 38 N. J. Eq. 20.) The court must award damage to the whole parcel, for that is the only rule which gives compensation. (*In re Utica*, 56 Barb. 464; *In re N. Y. Central R. R. Co.*, 15 Hun, 68; *In re Poughkeepsie*, 63 Barb. 151; *Lahr v. M. R. Co.*, 104 N. Y. 295.)

FOLLETT, Ch. J. Since January 31, 1882, the plaintiff has been seized in fee of a lot of land in the city of New York

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extending from Pearl to Water street, which lot is $37\frac{8}{12}$ feet wide on Pearl and $34\frac{4}{12}$ feet wide on Water street. The westerly line of the lot is $105\frac{1}{2}$ feet in length and its easterly line is $101\frac{1}{2}$ feet in length. At the time of the trial of this action and since 1865 this lot has been occupied by a single brick four-story building extending from street to street and is known as No. 134 Pearl street and No. 100 Water street. It is covered by a single roof, without a transverse partition wall and with but a single flight of stairs between the first and second stories.

During seventy-six years before 1825 this property consisted of two lots owned by different proprietors, the one on Pearl street being about fifty feet in depth and the one on Water street about fifth-one feet in depth. In 1825 these lots became the property of one proprietor, since which they have been described, conveyed and used as a single lot abutting on both streets.

When the defendants were incorporated and when the road was built and leased, the lot in question was owned by three tenants in common, who on the 31st day of January, 1882, conveyed it to the plaintiff, since which date he has been the owner in fee and in possession.

October 27, 1871, the New York Elevated Railroad Company was incorporated under chapter 140 of the Laws of 1850, and pursuant to that chapter and chapter 606 of the Laws of 1866, chapter 489 of the Laws of 1867, chapters 595 and 606 of the Laws of 1875, and the consent of the city of New York, which owns the fee of the street, this corporation constructed in 1877 and 1878 its elevated road through Pearl street.

December 29, 1875, the Manhattan Railway Company was incorporated pursuant to chapter 606 of the Laws of 1875, and on the 20th of May, 1878, became the lessee of the road and since that date has been in the exclusive possession and engaged in operating it.

The defendants have not acquired the right to use the plaintiff's private rights to light, air and access which are incidents to his lot abutting on Pearl street.

January 26, 1888, this action was begun to recover (1) the damages (alleged to be \$3,000 annually) to the rental value of the property occasioned by the wrongful impairment by the defendants of these street rights, and (2) a judgment restraining the defendants from continuing to use those rights except on the payment of \$20,000 damages for the past injuries and \$50,000, the alleged value of the rights of which the plaintiff had been in part deprived by the construction and operation of the road.

On the decision made at Special Term it was adjudged that the plaintiff was an abutting owner and as such entitled to recover \$17,000 with the costs of the action for the impairment of the rental value of the premises from January 31, 1882 (when he acquired title), to January 26, 1888 (when he began this action), and (2) that the defendants be restrained from operating the road after March 6, 1889, unless they should pay \$20,000, adjudged to be the value of the rights impaired, upon the execution by the plaintiff of a proper conveyance of his street rights to the defendants. This judgment was affirmed at the General Term and the defendants appealed to this court.

The only ground urged as error by the appellants is based upon the assumption that the premises consisted of two independent lots, one fronting on Pearl street and the other on Water street, and that the plaintiff recovered damages for injuries to both. This assumption is without foundation. The plaintiff did not, in his complaint, describe the property as two separate lots. He alleges: "I. That the plaintiff is now and has been since the 31st day of January, 1882, seized of an estate of inheritance in fee simple absolute in the premises known as No. 134 Pearl street and No. 100 Water street, in the city of New York." * * *

"II. That the plaintiff is and has been since the 31st day of January, 1882, seized of an estate of inheritance in fee simple absolute in the premises described as follows, viz: All those two certain lots, pieces or parcels of land, situate, lying and being in the first ward of the city of New York,

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with a brick store thereon, which taken together extend from Pearl street to Water street." * * *

"XVI. That said structure and railroad occupy and greatly obstruct Pearl street, adjoining the premises above described, and exclude the light and air from said premises and hinder access thereto."

"XVII. On information and belief that the trains darken the offices facing on Pearl street and render what light there is fitful and uncertain." * * *

"XVIII. On information and belief that the erection of said structure and the running of said trains thereon have created an additional burden on the premises above described and have interfered with the plaintiff's rights and easements in Pearl street and that his rights to have the whole of Pearl street in front of said premises a free and open passageway and have light and air enter the building thereon free from any obstruction in said street." * * *

On the trial the plaintiff showed that the entire lot was then and for many years had been occupied by a single brick building extending from street to street, but gave no evidence that the premises were occupied as independent parcels, one fronting on each street, nor does the decision of the trial court or the judgment following it proceed upon the theory that the plaintiff was entitled to recover for injuries occasioned to two independent lots. The decision and the judgment are to the effect that the property consisted of a single lot, which had been injured, by the defendants. This property having been occupied as an entirety anterior to the time when the road was built or authorized to be built, the defendants were not entitled to have the damages limited to that part of the property owned and occupied before 1825 as a single lot abutting on Pearl street.

The fact that the building and lot were accessible to persons, property, light and air from two streets was important as bearing on the extent of the injuries occasioned by the occupation of one of the streets by the defendants, but it does not appear that this fact did not have due weight with the trial court.

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In *Mooney v. N. Y. Elevated R. R. Co.* (30 N. Y. St. Repr. 651), there were two independent and wholly unconnected buildings on the plaintiff's lot, one fronting on Greenwich street, in which the railroad is, and the other on Beach street, in which there is no railroad. The building on Beach street fronts on and is entered and receives its light and air from that street. The trial court received evidence of, and gave judgment for the diminished rental value of the Beach street building, which was held to be error. In that case the light, air and access to the building on Beach street was in no wise interfered with by the railroad.

In *Greenwood v. Metr. Elevated Ry. Co.* (26 J. & S. 482), the plaintiff's property fronted on Vesey street and was 64 feet deep on Church street in which the railroad was built. This property was known as Nos. 31 and 33 Vesey street and was occupied by one building. Formerly, these lots were owned by different proprietors and occupied by distinct buildings. Whether these lots became the property of a single proprietor before or after the railroad was built, or whether the building which now covers them was built before or after the construction of the railroad does not appear. In the case last cited, lots 31 and 33 were, with other land, formerly owned by a single proprietor who laid it out into lots and conveyed No. 31 to one purchaser, and afterwards conveyed No. 33 to another. It appears to have been conceded by the argument of the learned counsel for the railroad, as reported, that before the conveyance of No. 31 both it and No. 33 had appurtenant rights in Church street, but it was urged that when No. 31 was conveyed the right of No. 33 in that street was abandoned, cut off and destroyed. Undoubtedly these conveyances had that effect. But it was urged that the reunion of these lots in the hands of a single proprietor did not restore to No. 33 the rights in Church street which it had before it was separated from No. 31 by the conveyance. This proposition was rested on the rule that in case an easement—the right which the dominant estate has over the servient one—is abandoned or destroyed by the act of the owner of the dominant estate,

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that it cannot be restored or brought into existence without a new grant from the owner of the servient estate. It was also urged in support of the proposition that a reunion of the lots conferred no rights in Church street in favor of No. 33, because the owner of a dominant estate does not, by the acquisition of adjacent land, acquire the right to use the easement over the servient estate for the benefit of the newly acquired property. The illustration might have been carried farther. A. owning a lot 25 by 100 feet covered with a building has a right of way to and from it over the land of B. Subsequently, A. buys an adjacent lot and covers both with a single building. He cannot use his right of way over the land of B. for his enlarged lot and new building because it would increase the burden of the servient estate. Would it be argued that the owner of No. 31, having rights in Church street, by adding No. 33 and covering it with a building lost all of his rights in that street? We think not.

The characterization of these street rights as easements and implying that they are governed by the rules, and are subject to the limitations of common-law easements, tends to obscure the rights of abutting owners on the one hand and of the corporations on the other. They may be easements in the sense that the owner of land is sometimes said to have an easement for lateral support in adjacent land, or that the owner of land bordering on navigable waters having certain private rights to the shore is sometimes said to have an easement, but in neither case are the rights common-law easements. There is no dominant nor servient estate, and the rules applicable to easements have not generally been applied to such rights. (Goddard on Easements, *et seq.*) The judgment in the *Greenwood* case was rested on the ground that the street rights once appurtenant to both lots, having been destroyed as to 33 by the prior conveyances of 31, they could not be restored by the subsequent reunion of both lots. This conclusion, as applied to such rights as are under consideration, we think cannot be supported.

The defendants are liable for the damage done to the property in the condition in which it was when injured by them,

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and there is no rule of law or equity which entitles them to have the lot and building divided transversely by an arbitrary line or by the line of division which existed prior to 1825 so as to limit their liability for damages to the half of the property abutting on Pearl street.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

ALBERT A. BLIVEN, Respondent, v. SMITH LYDECKER et al.,
Appellants.

When an agent, authorized to lend moneys of his principal but not to take usury, lends such moneys at a usurious rate, and both the sum lent and the usury exacted are secured by the same obligation, which the principal, knowing that it is for a larger amount than the sum loaned, without explanation accepts and has the benefit of, it is an adoption and ratification by him of the act of the agent, and neither the principal nor his assignees can enforce the obligation.

In an action to foreclose a mortgage, the defense to which was usury, it appeared that the agent of the mortgagee made the agreement for the loan apparently in his own name; he exacted as a condition of the loan the payment of a sum of money in excess of lawful interest. This sum was deducted from the amount agreed to be loaned, the mortgagor receiving the balance. There was no evidence that the agent retained this sum from moneys furnished by his principal, or that the latter advanced more than was received by the mortgagor; the mortgagee accepted the mortgage and received interest on the full amount until she assigned the same to plaintiff. *Held*, that the inference was permissible from the evidence, that the mortgagee in accepting the security knew it was for a larger sum than she had advanced; and so, in the absence of explanation, a finding was proper that she had notice that usury had been taken and that, in receiving the benefit thereof, she ratified the action of such agent; and, this having been found, that the mortgage was usurious and void.

Condit v. Baldwin (21 N. Y. 219), distinguished.

Bliven v. Lydecker (55 Hun, 171), reversed.

(Argued October 19, 1891; decided October 30, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 9,

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1889, which reversed a judgment in favor of defendants, entered upon the decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage dated February 1, 1879, made by Smith Lydecker and Jeannette, his wife, to Margaretha Schuler, to secure the payment of \$4,000, on February 1, 1882, with annual interest at the rate of seven per cent. The mortgage was collateral to a bond in the usual form, and on the 10th of November, 1888, both bond and mortgage were assigned to the plaintiff by said mortgagee.

The defense of usury was interposed by the defendant Smith Lydecker, and by the infant children of his deceased wife Jeannette, who owned the premises covered by the mortgage at the time of her death in February, 1882.

The trial court found that in December, 1878, said Smith Lydecker requested John W. Schuler, the husband of the mortgagee, to lend him \$4,000, which Mr. Schuler agreed to do, provided Lydecker would pay him \$400 in excess of lawful interest and accept the loan in installments, to all of which Lydecker assented. Pursuant to this arrangement, Schuler advanced to Lydecker \$1,000, on December 12, 1878; \$200, January 18, 1879, and \$1,800, February 15, 1879, and took the promissory notes of said Lydecker and wife for the two largest sums and the individual note of Mr. Lydecker for the smallest sum. Each note bore the date of the advance it was given for and was made payable to the order of Schuler, with interest. The sums so advanced, with interest thereon to the date of the mortgage, amounted to \$3,036.62, which, with \$563.38 paid by Mr. Schuler in cash at the time the bond and mortgage were given, formed the sole consideration therefor, except the bonus of \$400 previously agreed upon.

The trial court found specifically that "the agreement to pay said ten per cent in excess of lawful interest, or \$400 bonus, was a part of the contract for the loan, and said \$400 was deducted from and reserved by the mortgagee out of the sum agreed to be loaned." And also that "the contract for the loan and the bond and mortgage given to secure it, were usurious and the mortgagee participated in the extortion. She

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advanced \$3,600 and received a security for \$4,000 as the result of an entire contract made by her husband, and there was no separate agreement to pay him as agent. The agreement for the ten per cent bonus was known to her and she acquiesced in and authorized it." Upon the request of the plaintiff, it was also found "that the said money was loaned to the defendant through John W. Schuler, the agent of the mortgagee," but the trial court refused to find the further request that "said mortgagee had no knowledge that any usury was taken by her agent and never assented thereto."

As conclusion of law, the court found that the bond and mortgage were usurious and void, and directed that the complaint be dismissed on the merits, with costs.

Irving Brown for appellants. The mortgage was usurious and plaintiff cannot recover. (*Wyeth v. Braniff*, 84 N. Y. 627; *Algur v. Gardner*, 54 id. 390; *Pratt v. Elkins*, 80 id. 198; *Bald v. A. M. E. Church*, 8 Cent. 927.) The court cannot review the facts. (Code, §§ 1337, 1338; *Wend v. Craig*, 87 N. Y. 350; *Reitz v. Reitz*, 80 id. 338; *Kane v. Cortesy*, 100 id. 132; *Prosser v. Bank*, 106 id. 677; *Inglehart v. Thousand Island Co.*, 109 id. 454; *Whitman v. Finch*, 123 id. 636.) The opinion of the General Term cannot be referred to for the ground of reversal. (*Van Tassel v. Wend*, 76 N. Y. 614; *Swebey v. Connor*, 78 id. 218.)

Garrett Z. Snider for respondent. To render the mortgage void it was necessary for defendant to show not only that a bonus was exacted by the agent of the lender but that it was exacted with the assent of the principal and that she became a party to the usurious exaction. (*Condit v. Baldwin*, 21 N. Y. 219; *Bell v. Day*, 32 id. 165; *Alger v. Gardner*, 54 id. 360; *Esternz v. Purdy*, 66 id. 446; *Van Wyck v. Walters*, 81 id. 352; *Fellows v. Songyar*, 91 id. 329; *Phillips v. Mackellar*, 92 id. 34; *Stillman v. Northup*, 109 id. 473; *Baldwin v. Daying*, 114 id. 552.) If an agent takes usury without the knowledge or participation of the lender, the security is not void. (*Arnot v. Whitcomb*, 22 Wkly. Dig.

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195.) That Schuler did not disclose his agency is immaterial. (*Cull v. Palmer*, 116 U. S. 98.) The defense of usury cannot be made out from inferences. (*Phillips v. Mackellar*, 92 N. Y. 34; *Van Wyck v. Walters*, 81 id. 352.) The finding of a material fact where there is an absence of evidence to sustain it is error of law, reversable in this court. (*Matthews v. Coe*, 70 N. Y. 239; *Caswell v. Davis*, 58 id. 223; *Pollock v. Pollock*, 71 id. 137; *Bedlow v. Dry Dock Co.*, 112 id. 263; *Sickels v. Flanagan*, 79 id. 224.)

VANN, J. The judgment rendered by the Special Term was not reversed upon a question of fact (Code C. P. § 1338), but the order of reversal was based upon the assumption that there was no evidence to support the finding that the mortgagee either authorized or acquiesced in the exaction of the bonus of four hundred dollars.

She does not appear to have been present when the usurious agreement was made by her husband and agent, nor during any of the negotiations that resulted in the execution of the mortgage. The business was all done by Mr. Schuler, who made the agreement for the loan, apparently in his own name, and advanced the several installments and took notes therefor payable to his own order, as if the money belonged to him. After three thousand dollars had been advanced, Mr. Schuler and Mr. Lydecker met to arrange for the mortgage and made a statement of the sums constituting the principal thereof, which was read in evidence, and is as follows, viz.:

"Memoranda of acc't for mortgage of Mrs. S.			
\$1,800, int. 1 mo. 10 days, \$14.00.....		\$1,814	00
1,000, " 3 " 13 " 20.03.....		1,020	03
200, " 2 " 7 " 2.59.....		202	59
Discount for cashing mortgage.....		400	00
		<hr/>	
		\$3,436	72
\$4,000 mortgage.....		4,000	00
		<hr/>	
\$3,436 cash paid in.		\$563	38
\$564 cash rec'd from Mr. Schuler."			

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At the bottom of the memorandum were the computations by which the three sums of interest above mentioned were arrived at. Up to this time Mr. Lydecker did not know that Mrs. Schuler had any connection with the matter, but supposed that he was dealing exclusively with Mr. Schuler, who, moreover, then told him that "he put this mortgage in his wife's name so that he would not have to pay any taxes on it." After the mortgage was given Mr. Schuler collected the interest until his death in September, 1887. When Mrs. Schuler assigned the mortgage to the plaintiff in November, 1888, she covenanted that there was due thereon "four thousand dollars and interest," and is hence presumed to have had the benefit of the four hundred dollars of usury. There was no evidence tending to show that any other person had the benefit of it, or that Mr. Schuler retained that sum as his compensation from money furnished by his wife. Except as stated it did not appear to whom the money lent belonged. Thus we have a case where the exaction of usury was part of the contract by which the loan was made. Pursuant to that contract but \$3,600 was advanced, while a bond and mortgage for \$4,000 was required and given. The mortgagee accepted the mortgage and through her agent collected the interest on the entire principal thereof for more than eight years. Although the business was done by her agent it was done for her benefit and it was a permissible inference from the evidence that she knew when she received the mortgage that it was for a larger sum than she had advanced, and hence, in the absence of explanation that she thus had notice that usury had been taken. After accepting the usurious security under such circumstances and receiving the benefits of it for year after year, she could not insist that it was valid because her agent had no authority to take usury for her. Acceptance of the mortgage with knowledge of its unlawful origin, or with such notice as would cause a prudent person to make inquiry, was a ratification of the usurious contract and equivalent to prior authority to make it. (*Hyatt v. Clark*, 118 N. Y. 563; *Hoyt v. Thompson*, 19 id. 207; *Ingalls v. Morgan*, 10 id. 178; Story on Agency,

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§ 140; 1 Am. & Eng. Encyc. of Law, 429; Hovenden on Fraud 144, 145; Dunlop's Paley, 172.)

The cases cited by the learned counsel for the respondent, of which *Condit v. Baldwin* (21 N. Y. 219) is a type, are not analagous, because in that case the agent was held to have made two contracts with the borrower, one in behalf of his principal by making the loan, the other in behalf of himself by providing for his own compensation in procuring the loan. The principal had no benefit from the sum thus exacted and as the security taken was for the precise amount of the loan, there was nothing on the face thereof importing usury. The court said that as "the agent did not assume to act for another, but acted for himself and for his own benefit, a subsequent ratification did not bind the principal."

But where, as in this case, an agent authorized to lend, but not to take usury, lends the money of his principal at a usurious rate and both the sum lent and the usury exacted are secured by the same instrument, which the principal, knowing that it is for a larger amount than the sum loaned, without explanation, accepts and has the benefit of, she adopts, ratifies and is bound by the act of her agent the same as if it had been done by herself. (*Dempsey v. Chalmers*, 44 A. L. J. 333, and cases there cited.)

If the mortgage was void for usury in the hands of the mortgagee, it is void for the same reason in the hands of the plaintiff, her assignee.

It may be that if Mr. and Mrs. Schuler had been living, so as to testify at the trial, a different state of facts would have been disclosed, but we think that the evidence as it stands is sufficient to sustain the findings of the trial court, even under the stringent rule applicable to proof of usury, and that the findings required a dismissal of the complaint.

The order of the General Term should be reversed and the judgment of the Special Term affirmed with costs.

All concur, except HAIGHT, J., not voting.

Order reversed and judgment affirmed.

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180	108
d156	488

180	108
166	75

180	108
169	284

FREDERIKA EGERER, Appellant, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Respondent.

The owners of lots abutting on a city street have, although the fee thereof is in the municipality, certain rights and privileges therein, in the nature of easements, which constitute property, and of which they may not be deprived without just compensation. (State Const. art. 1, § 6.)

While, therefore, the legislature may direct the closing of a street and may empower the municipality to discontinue its use as such, this power is subject to the constitutional prohibition, and it may not be exercised so as to deprive an abutting owner of the access to his premises furnished by the street, without making compensation; at least unless there is provided or left for him other means of access.

Under the act of 1880 (Chap. 147, Laws of 1880), which permitted the defendant to agree with commissioners appointed by the act on behalf of the city of Rochester, upon a plan to elevate its tracks along and across the city streets and to close up streets, etc., a portion of a street upon which plaintiff's premises abutted was discontinued and defendant having previously obtained title to the fee of the street, erected thereon an embankment about fourteen feet high, upon which it laid its tracks, leaving a space between it and said premises so narrow as not to admit of the approach of a team and carriage to them. Plaintiff's premises were used and occupied as a hotel and boarding-house. In an action to recover damages, upon these facts appearing, the court directed a verdict for the defendant. *Held*, error; that the plaintiff established a right to recover, and the question of damages should have been submitted to the jury.

Radcliff v. Mayor, etc. (4 N. Y. 195); *Coster v. Mayor, etc.* (43 id. 399); *Fearing v. Irwin* (55 id. 490); *Wilson v. N. Y. C. & H. R. R. Co.* (Unreported, see *mem.* of decisions, 39 Hun, 651), distinguished.

(Argued June 25, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1888, which affirmed an order directing a verdict in favor of defendant and directed judgment upon said verdict and denied motion for a new trial.

This action was brought to recover damages arising from the construction in the street in front of plaintiff's premises by defendant of elevated tracks, and thus depriving her of light, air and access.

At the close of the evidence on the trial, the court directed

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a verdict for the defendant, to which plaintiff excepted and the court thereupon ordered the exceptions to be heard at the General Term in the first instance.

The principal facts in the case are these: Plaintiff's premises are situated upon North avenue formerly North street, which has been a street in use by the general public for many years and afforded access to plaintiff's premises. Under the act of the legislature, chapter 147, Laws of 1880, the defendant agreed with commissioners appointed by the act upon behalf of the city of Rochester, upon a plan to elevate the track along and across the streets in said city, to close up streets and to change the location of its tracks. In carrying out the plan, the portion of said street in front of plaintiff's premises was discontinued and the defendant erected at that point an abutment of stone and an earth embankment about fourteen feet in height and upon it placed its rails and structure and operated its road, leaving but a narrow space between it and plaintiff's premises insufficient to admit of the approach of a team and carriage to them. The defendant had acquired previously to the time of discontinuing the street the fee of the same for railroad purposes, subject to its use for the general public. The plaintiff's premises had for several years previously, and at the time of said change, been used as a hotel and boarding-house and the rental value of the same had been diminished in consequence of these changes. No compensation had been made to plaintiff.

Other facts will be found in the opinion.

Thomas Raines for appellant. Neither the legislature nor the city of Rochester nor both combined could devote the street to purposes inconsistent with such street uses without compensation. (*Abendroth v. M. R. Co.*, 122 N. Y. 11; *Kane v. M. E. R. Co.*, 125 id. 164; *Powers v. M. R. Co.*, 120 id. 183; *Fobes v. R., W. & O. R. R. Co.*, 121 id. 505; *Lahr v. M. R. Co.*, 104 id. 268; *Cogswell v. N. Y. & N. H. R. R. Co.*, 103 id. 10; *Story v. N. Y. E. R. R. Co.*, 90 id. 122; *Mahady v. B. R. R. Co.*, 91 id. 148.) The acts of defendant

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were not authorized by the law, under which defendant justifies. (Laws of 1880, chap. 147; *Cogswell v. N. Y. & N. H. R. R. Co.*, 103 N. Y. 10; *Bellinger Case*, 23 id. 29; 55 id. 54; 70 id. 368; *Bohan v. P. I. G. L. Co.*, 122 id. 18.) The opening or mapping out of lands as a street is a pledge that it shall not be closed or appropriated to a different and a less beneficial purpose which cannot be violated without a breach of faith to subsequent purchasers and builders. (Dillon on Mun. Corp. [4th ed.] § 666; 16 Cent. L. J. 124.)

Edward Harris for respondent. The plaintiff is not entitled to any damages by reason of any obstruction of means of access to her premises from the street, because it appeared that she has just as complete access to the street in front of her premises as she ever had. This is not the case of user by defendant of any part of a highway. (*Story v. N. Y. E. R. R. Co.*, 90 N. Y. 122; *Conklin v. N. Y., O. & W. R. Co.*, 102 id. 107; *Fobes v. R., W. & O. R. R. Co.*, 121 id. 505.)

POTTER, J. The action is brought to recover damages occasioned to plaintiff's means of access to her building and premises, and to the air and light incident thereto, in consequence of the structure of defendant in front of or near, the plaintiff's premises.

A street or highway is principally designed and devoted to the use of the public to travel upon with teams and carriages and upon foot, and it may not be used for any other purpose, except it be a *quasi* public use, such as a railroad carrying persons and freight under certain limitation. (*People v. Kerr*, 27 N. Y. 188; *Kane v. N. Y. E. R. R. Co.*, 125 id. 164.)

Certain town and city officers are made by law trustees of highways and streets, and are charged with the care of them, and their legitimate use for the purpose of ordinary travel and passage by teams, vehicles and persons on foot.

The officers having charge of ordinary country roads have not the absolute power to lay out a new, or to close an old, highway. They cannot do either of said acts without the consent of the owners or abutters, or a course of legal procedure

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prescribed by statute, after notice to the owners, abutters and those interested, and the verdict of a jury, and the assessment and payment of the damages sustained in consequence of the laying out of a new, or the discontinuance of an old, road. (See the various provisions of art. 4, title first, chap. 14, part 1, R. S., and the Laws of 1882, ch. 317.)

The charters of all cities, so far as I have had occasion to examine or observe them, contain similar provisions restricting the exercise of the power to open or close streets by municipal authority. I find the following in sec. 167, sub. 4 of the charter of the city of Rochester upon this subject, viz.: "The executive board, whenever authorized by the common council, shall have the same power with respect to said city, to discontinue any street therein, as is now by law possessed by commissioners of highways of towns, with respect to roads in towns; and the same proceedings shall be had, and the same appeal shall lie, from the decision of the said executive board, and the same proceedings shall be had on such appeal as are now provided by law in reference to towns so far as applicable."

I do not at all question the power of the legislature to open and to close streets and highways within the constitutional limits, but I refer to these restrictions to show the safeguards and protection to the citizen which the legislature has imposed upon the public officers in the exercise of the power to open and close streets and highways.

But the legislature itself may not exercise this power absolutely and without regard to the rights of the citizen. The Constitution imposes the restraint upon the legislature that it shall not appropriate private property to public uses without just compensation therefor to the owner of the property. (Art. 1, § 6; *Abendroth v. Man. R. Co.*, 122 N. Y. 1.)

Had the plaintiff any rights to air, light or access as "abutting owner" of lands bounded upon the street, which was closed as a street and upon which "all the structures of the defendant complained of in this case are situate?"

The street which was occupied by defendant's structure in this case had been in the use of the general public as a street

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for more than fifty years, and the plaintiff and her grantors had used the access which it afforded to her house and premises for that period of time.

The structures complained of practically destroyed the only access to the plaintiff's premises with a team and wagon, and the annual rental value of the plaintiff's premises was diminished in consequence of the defendant's structures by the sum of four or five hundred dollars. It has been held by this court, and recently by each division of it, that "An owner of a lot adjoining a city street, although his title extends only to the side of the street, and he has no ownership of the land or interest therein, save as abutting owner, has incorporeal private rights therein, which are incident to his property, and which may be so impaired as to entitle him to damages. Such rights are private property, within the provisions of the State Constitution (Art. 1, § 6), which forbid the taking of private property for public use, without just compensation. It is no justification, therefore, for the impairment that the act complained of was done pursuant to legislative authority. (*Abendroth v. Man. R. Co.*, 122 N. Y. 1.)

"The owners of lots abutting on a city street, the fee of which is in the municipality, have, by virtue of proximity, special and peculiar rights, facilities and privileges therein in the nature of easements, which are not common to the citizens, and constitute property of which they cannot be deprived by the legislature or the municipality, or both, without compensation; and any use of such street inconsistent with its use as a public street, which interferes with these easements, is a taking of property, for which said owners are entitled to compensation to the extent of the damages occasioned thereby." (*Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 165.)

Since the able and exhaustive examination which this question has received in the opinions of the court in the two cases last referred to, there is no occasion for further discussion of it. These cases hold, and they are supported by numerous authorities, that though the defendants therein had constructed and run their roads under authority of the legislature and of

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the municipality, yet there was a right of access to the plaintiff's premises for substantial interference with which defendant was liable, and that the plaintiff could not be deprived of such right without just compensation.

We come now to the more particular consideration of the question whether a party enjoying the right of light, air and access may be deprived of such rights by the action of the municipal authority in the discontinuance of the street in respect to which such rights exist without compensation therefor, or any provision for compensation. This question may be considered as simply a discontinuance of the street in question, within the power and discretion possessed by the proper officers of the city of Rochester, or as a discontinuance or an alteration of this street by municipal authority, or by commissioners acting for the municipality, under an act of the legislature in connection with and in furtherance of the convenience and advantages of the defendant's railroad. Can the city exercise such power in a manner that shall deprive a citizen of the right of access to his premises while affording or leaving him no other access? We have seen from the cases above cited, that a municipality cannot divest the citizen of such rights, even where the municipality grants the right of laying the tracks and running the cars of a railroad along one of the streets of a city which is still devoted to and used by the general public as a street.

Under the provisions of the statute in relation to county roads, and as I apprehend under most city and village charters as to streets and roads in cities and villages, the officers having them in charge cannot arbitrarily abandon or discontinue them.

The statute provides a regular mode of procedure with compensation to effect a discontinuance of them. The question of the right or power of a municipality to discontinue a street has frequently been presented to the courts of this state, and it has been held that the authorities might do so when it is done in the manner prescribed by law and when *there is left to the private citizen other and suitable means of access*. To

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that effect are the cases of *Radcliff v. Mayor, etc.* (4 N. Y. 195); *Coster v. Mayor, etc.* (43 id. 399); *Fearing v. Irwin* (55 id. 490).

But it will be observed upon an examination of these cases, that they clearly and distinctly recognize the right of access, and that the owner of such rights cannot be deprived of a street affording him access to his premises, unless there is left for his use and enjoyment other suitable means of access, or the payment of a just compensation for the deprivation of the same.

Such was the character of the case of *Wilson v. N. Y. C. & H. R. R. R. Co.*, forming a part of the brief of respondent's counsel, and upon the authority of which the learned General Term seems to have relied in the decision of this case. In that case the plaintiff's lot extended from King to Litchfield streets in the city of Rochester. The defendant, under chapter 147 of the Laws of 1880 (the act in question in this case), closed up Litchfield street, but left the access afforded by King street. In short, did not deprive the plaintiff of the means of access to his lot. I am not disposed to adopt the doctrine that a municipality may close up a street upon which abutting owners have built expensive structures for residences and business, and enjoyed access to them from the street so closed for many years, arbitrarily and without compensation for the injuries done to such rights. Such rights are substantial and essential rights for the enjoyment of property and are appurtenances thereto. (*Abendroth v. M. R. Co.*, *supra*, at page 15 of the opinion, and the cases there cited; *Kane v. N. Y. E. R. R. Co.*, *supra*, at page 183, and cases there cited.)

It would thus seem that the plaintiff could not be deprived of her rights if the city of Rochester itself, under any power that may reside in its municipal charter, had closed the street and debarred the plaintiff from the enjoyment of those rights without making or providing compensation therefor.

But it may be contended that that view is not the real aspect in which this case is to be considered and decided. The municipality of the city of Rochester did not directly close

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this street and in that way interfere with the plaintiff's right, and that we need not here discuss or decide the liability of the city for that act, as it is not a party to the action.

The defendant, the railroad company, did the act complained of, and this action is brought against that company for its agency in interfering with and violating plaintiff's rights. The railroad company had laid its track upon this street with the consent of the city of Rochester, and by virtue of its right under condemnation proceedings. The right it acquired under the latter proceeding was the right to use this street to lay its track and run its cars, subject to the older and superior rights of the general public to use the street and, as we have seen, subject to the rights of the abutters to access, air and light.

Now it seems to follow as a conclusion from these premises that if neither the state nor the city of Rochester could legally close this street without making compensation to the abutting owners, the defendant railroad company acquired no right to erect its structures in such abandoned or discontinued street. (*Stetson v. Faxon*, 19 Pick. 147.) And if the street has not been legally discontinued, then the right of the railroad company is still limited as it was when it was first acquired, and is subject to the rights of the plaintiff in respect to easements and to the rights of the general public in respect to travel and passage. When, therefore, the defendant placed the structures complained of in the street, it violated the rights of the plaintiff in a much more marked manner than was done by the elevated railroad companies in *Abendroth* and *Kane* cases, *supra*, and for which this court held them liable in damages.

Since examining this case and writing the views and the conclusion above expressed, I have had an opportunity of perusing the very able and interesting opinion of Judge ANDREWS in the case of *Reining v. New York, L. & W. R. Co.* (128 N. Y. 157), recently decided, but not yet in the regular reports.

The facts in that case were briefly these: The defendant road was located upon Water street in the city of Buffalo. Plaintiff's building was located upon premises fronting and

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abutting said street. Upon the east of plaintiff's premises was Commercial street, and upon the west was Maiden Lane street. The municipal authorities of the city of Buffalo authorized the defendant in that case to raise the grade of Water street some five or six feet in front of plaintiff's premises, and extending beyond the crossing of Commercial street and leaving a strip of some nine feet in width along the north side of Water street for a wagon-way, and a strip fourteen feet wide for a sidewalk at the former grade. The raised grade was twenty-four feet wide and was supported by stone walls, and was paved and used as a street when that action was commenced.

The learned judge, in his opinion, reviews the cases bearing upon this subject and distinguished it from the case of *Fobes v. R., W. & O. R. R. Co.* (121 N. Y. 505), upon which the defendant in that case sought to sustain the defense and held that the raising of the grade of the street in that manner, even under the license of the authorities of the city of Buffalo, was a violation of the plaintiff's rights of access, though the plaintiff had no title to the land within the lines of the street, and that the defendant was liable for the damages plaintiff had sustained. The case under consideration is a much stronger case than the case cited.

In the case under consideration the obstruction *prevented* access to the plaintiff's premises with a team and vehicle. In the case referred to, it made it *inconvenient* to approach plaintiff's premises in that manner.

We think the direction of a verdict for the defendant was error, and that the question of plaintiff's damages should have been submitted to the jury. The judgment should be reversed and a new trial granted, with costs to abide event.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Judgment reversed.

Statement of case.

JULIA RHINELANDER DODGE et al., Appellants, v. MARY L.
GALLATIN et al., Respondents.

Under the law, as it existed in this state prior to the revision of 1830, a testator could only devise such lands as he was seized and possessed of at the time of the making and publishing of his will, save where he was at that time in possession under equities, which the court would enforce, in which case such rights and equities would pass under a devise.

In February, 1807, R. made and published his will by which he devised all his residuary real estate of which he was then or might be seized and possessed of at the time of his death to C. At that time R. was the owner of certain lands in the city of New York, bounded easterly by the high-water mark of the Hudson river; he subsequently petitioned the common council for a grant of land under water in front of his uplands. Such a grant was executed and delivered in November, 1807. R. died in 1809 without republishing his will. In an action of ejectment brought to recover two lots, part of the lands covered by said grant, in which action defendants claimed title under said will, it appeared that in 1794 the board of aldermen of said city passed a resolution to grant the then owner of said uplands the water lots in front thereof. In 1797 the then owner petitioned said board for a grant so that he might build a bulkhead and fill in his water lots; this was referred to a committee, who reported in favor of a grant, which report was agreed to by the board. It did not appear that any conveyance was executed; but it appeared that the petitioner, prior to 1799, took possession, docked out and filled in the lots and had the use of the property from that time. In 1798 the city presented a petition to the legislature setting forth, among other things, that it had lately directed a permanent street to be laid out at the extremity of its grants "already made and thereafter to be made" on said river, and asking authority to compel the proprietors of the lots fronting thereon to make the street. Thereupon an act was passed (Chap 80, Laws of 1798), authorizing the city to lay out the street at the expense of the adjoining proprietors and requiring the proprietors of the uplands, who had not acquired title to the land under water, to fill up the space between their lots and said street. The act provided that upon their doing this they shall "be respectively entitled to become the owners of the said intervening space of ground in fee simple." The city accepted the act, and, in pursuance thereof, the then owner of the upland adjoining the land conveyed by said grant, filled in the space between his uplands and said street. *Held*, that these facts disclosed an equitable title in R. at the time of the execution of his will, which passed by the devise.

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It seems a controversy as to the amount due upon a contract for the purchase of real estate would not prevent its passing by devise in the will of the purchaser executed prior to 1880; subject, however, to the amount that should be found due.

M., one of the heirs of R. and under whom plaintiffs claimed, was at the time of his death and at the time of her death, which occurred in 1852, a married woman. She died leaving two children, both of age. Her husband died in February, 1854. From 1823 to the death of M. the premises were held adversely to her by those under whom defendants claim. *Held*, that action should have been brought within ten years after the death of the husband, and not having been brought within that period was barred by the Statute of Limitations. (Code Pro. § 88.)

Exceptions were taken to the admission in evidence of petitions to the common council for the grant and of certain old maps and leases. It appeared that upon the death in 1825 of the then owner of the uplands he left a large landed estate, which for upwards of fifty years was under the management and control of his executor, who had an office as executor, and in a safe therein, kept the books and papers of the estate, including a large number of old deeds, leases and muniments of title, and among these the petitions, maps and leases were found. The fact that petitions by the parties were presented to the board of aldermen at the dates indicated appeared by a record of its proceedings. A careful examination, however, failed to find the petitions on file. *Held*, that the papers were properly received as ancient writings, and the petitions as being the best evidence obtainable of the petitions presented to the board of aldermen.

Reported below, 52 Hun, 158.

(Argued October 5, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department entered upon an order made April 9, 1889, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Daniel Dougherty for appellants. Under the law as it existed in 1807, when Wm. Rhineland, Jr., published his will, land acquired subsequently to the date of the publication of a will did not pass thereby, but vested in the heir at law. (*Lynes v. Townsend*, 33 N. Y. 561; *Jackson v. Holloway*, 7 Johns. 81; *Jackson v. Potter*, 9 id. 312.) Neither Wm.

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Rhineland, Jr., nor his father before him had any right whatever to grants on account of the ownership of the upland. (*Mayor, etc., v. Hart*, 95 N. Y. 443; *Appleby v. Mayor, etc.*, 41 Hun, 281; 4 N. Y. S. R. 496; *Furman v. Mayor, etc.*, 6 Seld. 567; *Gould v. H. R. R. R. Co.*, 2 id. 522; *Towle v. Remsen*, 70 N. Y. 303; *Langdon v. Mayor, etc.*, 93 id. 134; *Nott v. Thayer*, 2 Bosw. 25; *Wendell v. People*, 8 Wend. 188; *Comrs. v. Kimpshall*, 26 id. 410.) In order to sustain the defense of equitable title, which is the main defense herein, it must appear that Wm. Rhineland, Jr., actually owned the land in question at the time he made his will, and before he applied for or acquired the grant, and was then entitled to a grant from the city confirmatory of his title, without the performance of any conditions, and that the grant, when subsequently acquired was in confirmation of his actual ownership. (*Lynes v. Townsend*, 33 N. Y. 563; *Jackson v. Holloway*, 7 Johns. 394; *Jackson v. Potter*, 9 id. 312; *McKinnon v. Thompson*, 3 Johns. Ch. 307; *Stevens v. Hauser*, 39 N. Y. 302; *Denn v. Miller*, 5 D. & E. 558; *Thompson v. Burhans*, 61 N. Y. 52; *Van Kleeck v. Dutch Reformed Church*, 6 Paige, 600; *Carleton v. Darcy*, 90 N. Y. 566-573; *Hartun v. Corse*, 2 Barb. Ch. 506; *Dunham v. Townshend*, 118 N. Y. 281.) No rights to the land were acquired by Frederick Rhineland. (*Appleby v. Mayor, etc.*, 4 N. Y. S. R. 96; 41 Hun, 281; *Mayor, etc., v. Hart*, 95 N. Y. 443.) The referees erred in admitting the petition of Philip Rhineland to the common council, dated May 10, 1797, after plaintiff's objection. (*Mayer v. Osborn*, 32 N. Y. 669; *Hammond v. Varian*, 54 id. 398; *Jackson v. Luquere*, 5 Cow. 221; *Utica Ins. Co. v. Badger*, 3 Wend. 102; *Wilson v. Betts*, 4 Den. 201; *Martin v. Rector*, 24 Hun, 27; *Pollock v. Pollock*, 71 N. Y. 137; *Draper v. Stouvenel*, 38 id. 219; *Mason v. Lord*, 40 id. 476; *Sickles v. Flanagan*, 79 id. 224; *Putman v. Hubbell*, 42 id. 106; *Stilwell v. M. L. Ins. Co.*, 72 id. 385; *Davis v. Spencer*, 24 id. 386; *Westerlo v. De Witt*, 36 id. 335; *Halpin v. P. Ins. Co.*, 28 N. Y. S. R. 788; 118 N. Y. 165.) There was no adverse possession of the premises. (*Brandt v. Ogden*, 1

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Johns. 156; *Jackson v. Parker*, 3 Johns. Cas. 124; *Jackson v. Birner*, 48 Ill. 130; Starkie on Ev. 473; *Clark v. Owens*, 18 N. Y. 434, 439; *Jackson v. Johnson*, 5 Cow. 74; *La Frombois v. Jackson*, 8 id. 609, 613, 617; *Jackson v. Woodruff*, 1 id. 286; *Enfield v. Day*, 7 N. H. 457; *Hale v. Glidden*, 10 id. 397; *Zeller v. Eckert*, 4 How. [U. S.] 289; *Paschall v. Hinderer*, 28 Ohio St. 568; *Atty.-Gen. v. Fishmongers' Co.*, 5 M. & C. 16, 17; Perry on Trusts [2d ed.] §§ 863, 864, 866; *Thompson v. Pioche*, 44 Cal. 508; 1 Redf. on Wills, 502; *Schmittler v. Simon*, 101 N. Y. 558; *Pinney v. Johnson*, 8 Wend. 500; *D., L. & W. R. R. Co. v. Gilbert*, 44 Hun, 201; *Jackson v. Hathaway*, 15 Johns. 454; *Pope v. Hanner*, 77 N. Y. 240; *Wetmore v. Porter*, 92 id. 78; *Lee v. Horton*, 104 id. 538; *Stone v. Godfrey*, 5 De G., M. & G. 76; *Miller v. Downing*, 54 N. Y. 631; *Hallas v. Bell*, 53 id. 247.)

Henry H. Anderson for respondents. The premises in suit passed by the will of William Rhineland, Jr., to his uncle, Philip Rhineland, under whom the defendant Gallatin claims title. (*Livingston v. Newkirk*, 3 Johns. Ch. 312; *McKinnon v. Thompson*, Id. 307; *Malin v. Malin*, 1 Wend. 626; *Warren v. Fenn*, 28 Barb. 333; *Terrett v. Cowenhoven*, 11 Hun, 320.) The rights of the plaintiffs, if they ever had any, are barred by the Statute of Limitations. (Laws of 1801, chap. 183; 2 R. S. [2d ed.] chap. 4, §§ 5-17; Laws of 1870, chap. 741; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314; *Jackson v. Moore*, 13 Johns. 513; *Jackson v. Johnson*, 5 Cow. 74; *Thorp v. Raymond*, 16 How. [U. S.] 248; *Doe v. Jesson*, 6 East, 80; 2 Preston on Abs. 341; *Fleming v. Griswold*, 3 Hill, 85; Tyler on Eject. 930, 931.) William Rhineland was not trustee for Maria Paulding of the premises in suit. (Code Civ. Pro. § 829.) The ancient leases by the Rhinelanders and the applications by them to the common council were properly admitted in evidence. (1 Phillips on Ev. 281; *Clarkson v. Woodhouse*, 5 T. R. 413; 3 Doug. 189; *Barnes v. Mawson*, 1 M. & S. 78; *Teathes v. Newitt*, 4 Price,

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355; 8 id. 562; *Fisher v. Graves*, 3 E. & Y. 1180; *Hewlett v. Cock*, 7 Wend. 371; *Enders v. Sternberg*, 2 Abb. Ct. App. Dec. 31.)

HAIGHT, J. This action is brought in ejectment to recover the possession of two lots of land known as numbers 229 and 230 West street, between Beach and North Moore streets, in the city of New York.

The plaintiffs claimed the same as the heirs at law of William Rhineland, Jr. The defendant Gallatin claims title through his last will and testament, and that she and her immediate grantors have held adversely for upwards of twenty years. The other defendants are merely tenants of Mrs. Gallatin.

It appears that William Rhineland, the first, died in the year 1777; that he left surviving him three sons and three daughters; that the names of his sons were William Rhineland, Phillip Rhineland and Frederick Rhineland. Frederick Rhineland died intestate in the year 1805, leaving him surviving his widow, Mary; his son, William Rhineland, Jr., and his daughter, Maria, who became the wife of William Paulding. It appears that at the time of his death, he was the owner of several parcels of real estate located upon Greenwich street, between Chambers and Beach streets, in the city of New York, and that subsequently his widow released her right of dower therein to her children, and thereafter and on the 18th of December, 1806, Maria, then the wife of William Paulding, in consideration of the sum of one hundred and twenty-four thousand dollars, conveyed to her brother, William Rhineland, Jr., all the real and personal estate where-soever and whatsoever whereof her father, Frederick Rhineland, died seized or possessed, or was entitled to either in law or equity, in possession, reversion or remainder. It further appears that on the 3d day of February, 1807, William Rhineland, Jr., made and published his last will and testament, in which, after devising specific property to his sister, Mrs. Paulding, and other persons, not affecting the premises in question, provided and devised as follows: "Sixth.

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As to all the rest and residue of my property and estate whatsoever and wheresoever, real or personal, of which I am now seized or possessed, *or of which I may be seized or possessed at the time of my death*, I give, devise and bequeath the same to my uncle Philip Rhineland and to his heirs and assigns forever; provided always and the above devise is upon the express condition that if my said uncle Philip Rhineland should die without leaving issue at the time of his death and without devising in due form of law the estate hereby devised to him, then it is my will that the said estate, or such parts thereof as shall not be devised in due form of law, shall go, and I do hereby devise the same to my uncle William Rhineland, his heirs and assigns forever." As the heir at law of his father and grantee of his sister, William Rhineland, Jr., had become seized and possessed of the real estate upon Greenwich street, between Beach and North Moore streets, extending to the high-water mark of the Hudson river. As such owner, on or about the 1st day of June, 1807, he petitioned the common council of the city of New York to deliver to him a grant of the lands under water in front of his uplands out to the permanent line in the river established by the corporation. The application was agreed to by the board of aldermen, and a grant was ordered to be prepared, and the same was subsequently and on the 16th day of November, 1807, formally executed and delivered. This grant included the premises in question. Subsequently and on the 4th day of April, 1809, William Rhineland, Jr., died, and there is no evidence that he republished his last will and testament after the execution and delivery of the aforesaid grant. Thereafter his will was duly proved and admitted as a will of real and personal estate, and his uncle Philip Rhineland, as the devisee thereunder, entered upon and took possession of the premises included in the grant by the city. Thereafter and on the 14th day of July, 1817, Philip Rhineland made and published his last will and testament whereby after making certain specific legacies and devises not affecting the premises in question, he devised and bequeathed to his brother

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William Rhinelander the whole residue and remainder of his property and estate, real and personal, and in terms included in the devise and bequest the estate formerly devised to him by his nephew William Rhinelander, Jr. Thereafter and in the year 1822, he died without leaving issue him surviving. Thereupon William Rhinelander entered into possession of the lands in question. On the 30th day of March, 1825, he made and published his last will and testament whereby after making certain specific devises and bequests not affecting the premises mentioned, he devised all the rest and residue of his real estate to his executors in trust during the lives of his children and the longest liver of them, and at the termination of the trust, he devised the residuary to his grandchildren and the issue of deceased grandchildren in equal shares *per stirpes*. He died on the 9th day of September, 1825, leaving seven children him surviving, of whom Eliza, the wife of H. G. Stevens, and the mother of the defendant Mary L. Gallatin, was one. Of such children, William C. Rhinelander was the longest liver, and upon his death, June 20, 1878, the estate was partitioned among the grandchildren, and the lands in question in such partition action were set off to the defendant Gallatin as her share and portion of her grandfather's estate.

It further appears that Mrs. Paulding died June 1, 1852, and her husband William Paulding died February 17, 1854; that they left two sons them surviving, Frederick W. Paulding and Philip R. Paulding; that Frederick W. Paulding died March 17, 1859, leaving him surviving his daughter, the plaintiff Julia Rhinelander Dodge; that Philip R. Paulding died August 20, 1864, leaving him surviving Grace, his only child and heir at law, who is now the wife of Louis P. Grant; that he also left a last will and testament in which all of his estate was devised to his executors in trust during the life-time of such daughter, and the plaintiff Greenfield is now the sole trustee thereof.

Under the statute of 32 Henry VIII, chapter 1, it was provided that all and every person and persons having manors,

lands, tenements or herditaments holden of the king or of any other person or persons, and not holden of the king by knight's service, and so forth, shall have full and free liberty, power and authority to give, will, dispose and devise as well by his last will or testament in writing or otherwise by any act or acts lawfully executed in his life all his said manors, lands, tenements or hereditaments or any of them at his free will and pleasure.

Under this statute it was held that a person could only devise such lands as he was seized and possessed of at the time of the making and publishing of his will. (*Jackson v. Holloway*, 7 Johns. 394; *Jackson v. Potter*, 9 id. 312; *Lynes v. Townsend*, 33 N. Y. 558-563.)

This was the recognized law of our state until the revision of 1830, when it was provided that: "Every will that shall be made by a testator in express terms of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate, which he was entitled to devise, at the time of his death." (2 R. S. 57, § 5.)

William Rhinelander, Jr., having made and published his will on the 3d day of February, 1807, nine months before he obtained title to the lands in question by grant from the city, the land would not under the law, as it then stood, have passed to his uncle Philip, the devisee, but would have descended to his sister, Mrs. Paulding, his only heir at law.

It is claimed, however, that he was in possession and was the equitable owner at the time his will was made, and that it in express terms devised to his uncle Philip all the real estate of which he was seized and possessed at the time of making his will, as well as all of which he may be seized or possessed at the time of his death. If he was in possession under a contract to purchase or under equities which the courts would enforce, such rights and equities would pass under a devise subsequently made. (*Livingston v. Newkirk*, 3 Johnson's Chr. 312; *M'Kinnon v. Thompson*, Id. 307; *Malin v. Malin*, 1 Wendell, 625.)

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The question, therefore, is as to whether William Rhineland, Jr., at the time of making his will was in possession of the lands in question, and had he such an equitable interest therein as would pass to his uncle under his will.

There appears to be no question but that the city was the owner of the lands. For under the Governor Dongan and Governor Montgomerie charters the lands under water surrounding Manhattan island were granted to the mayor, aldermen and commonalty of the city of New York for the distance of four hundred feet. That the city had adopted the policy of conveying the lands so under water to the abutting upland proprietors, appears from the reports made to the board of aldermen, and the ordinances adopted by it fixing terms, conditions and charges which should be made therefor. It is said that the city was under no obligation to make grants to the upland owners; that it had the right to grant the lands so under water to any other persons. Possibly this right may have existed, but we do not deem it important at this time to determine the question, for it is sufficient to say that it does not appear that there was any attempt on the part of the city or its officers to make conveyance of such lands to any other persons than the upland owners.

Formerly the abutting uplands in question belonged to Trinity church, and was known as the church farm. On the 6th day of March, 1797, the church conveyed to Frederick Rhineland lots numbered 806, 807, 808, 809 and 810 on the west side of Greenwich street, bounded on the north by Beach street and the west by high-water mark of the Hudson river. It is said that under a map produced from the files of the church made by surveyor Charles Loss, in the year 1799, two years after the execution and delivery of the deed to Frederick Rhineland, the lots conveyed did not extend to high-water mark, and so it would seem to appear from the map, as the line indicated thereon as the high-water mark does not quite reach the lots marked with the numbers mentioned in the deed. But there can be no question but that the deed must control. By it the lands conveyed were bounded on the west

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by the high-water mark of the river, a boundary line well known and understood, and about which there could be no question. This map is not the one referred to in the deed, but was subsequently made for the purpose of showing the unsold lands belonging to the church.

It appears that previous to this conveyance, and in the year 1794, the board of aldermen had passed a resolution to grant to the Episcopal church the water lots north of Read street agreeable to such survey thereof as shall be approved by the board. Subsequently and on the 10th day of May, 1797, Frederick Rhineland, who, under his conveyance, had become an upland owner abutting on a portion of such water lots, petitioned the board of aldermen to make him a grant of the soil under water in order that he might build a bulkhead and fill the same in. Thereafter and on the 29th day of May, 1797, the street committee to whom the petition had been referred, reported that, in their opinion, a grant ought to be made to the petitioner out as far as the permanent line, he paying the quit rent established by the corporation, after his paying as a consideration for the ground between high and low-water mark, four hundred pounds. This report was agreed to by the board. But it does not appear that any conveyance was executed or money paid, but on the 26th of March, 1799, the common council ordered the recorder to inquire into the state of the water lots which were intended to be granted to Trinity church and improved by Frederick Rhineland. On the fifteenth of July thereafter a further resolution was passed directing the recorder to proceed against Mr. Rhineland by ejectment or otherwise for any intrusion on the rights of the corporation to the soil in the Hudson river. It is thus apparent that Rhineland had in some way taken possession of the land embraced in the report, and this is made apparent from a further report that was made by the comptroller of the city in 1803, in which he states that on the North river grants have been made from the Battery to Chambers street; that from Chambers street northward there had been no grants made, but the proprietors of the ground had

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most of them docked out agreeable to their own discretion, and some of them beyond the permanent line; that they had been in possession and had had the use of the property for years without any compensation being made to the public. Here the matter appears to have rested until June, 1807. Frederick having died in 1805, his son, William Rhineland, Jr., petitioned the mayor, aldermen, etc., for a grant of the lands so under water, and in his petition he refers to the petition of his father and of the action of the board thereon ordering the grant to be made. Upon the presentation of such petition it was referred to the comptroller, who was directed to make a report thereon, and in August thereafter the comptroller made a report to the common council, reciting all of the facts and recommending that grants be ordered to be made out in favor of the petitioner to the permanent line established by the city, and "*present wharves inclusively*," upon such terms as may be just and right according to the usual prices of grants in that quarter of the city. Subsequent reports were made by him and the street committee pertaining to the terms on which the grant should be made, and finally and on the 16th day of November thereafter, the grant was executed and delivered conveying to him the lots in question, describing them as the lands *of which he was at that time in actual possession*.

It further appears that on the 12th day of February, 1798, the corporation of the city presented a petition to the legislature of the state, showing that the city had lately directed a permanent street to be laid out and completed at the extremity of its grants already made and thereafter to be made to individuals on the East river near South street, and on the North or Hudson river near West street, south and west of which no buildings of any description were to be erected, and that by reason of the irregularities of the shore and the grants therefore made which were deemed to extend unequal distances into the rivers, and that, although the city was willing gratuitously to give the soil under water on which the streets were to be made, yet doubts were entertained whether the city, could

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compel any of the proprietors of the lots fronting thereon and who might be unwilling to make the streets for public use in any given reasonable time, and, therefore, prayed the legislature to confer upon the corporation full authority in the premises. Thereupon chapter 80 of the Laws of 1798 was passed, entitled "An act concerning certain streets, wharves and piers, etc., of the city of New York," whereby it was among other things enacted that it should be lawful for the mayor, aldermen and commonalty of the city of New York to lay out the streets mentioned in the petition and that the streets or wharves should be made or completed according to the plan adopted and at the expense of the proprietors of the land adjoining or nearest and opposite to the streets or wharves in proportion to the breadth of their lots, by certain dates to be for that purpose appointed by the mayor, aldermen and commonalty, and that the respective proprietors of such of the lots as may not be adjoining to the said street or wharves should also fill up and level at their own expense according to such plan and by the dates respectively the space lying between their several lots and the said streets and wharves, and should upon so filling up and levelling the same *be respectively entitled to become the owners of the said intermediate space of ground in fee simple.*

The referee has found as facts that the corporation of the city accepted this act of the legislature and acted upon it accordingly; that Frederick Rhineland, pursuant to the act, did fill out and level nearly all the space lying between his uplands and West street and was so engaged in filling out and levelling at the time of his death; that such filling was continued by his son, William Rhineland, Jr., up to the time that the grant was made to him and that the lands so filled up included the premises in question.

It is claimed that these findings are not supported by the evidence, but we are of the opinion that they are sustained. Of course, no living witness could be produced who could speak from personal knowledge. The facts had to be ascertained from the records and ancient papers that had been

preserved. That Frederick was in possession is quite evident from the proceedings of the board of aldermen, to which we have already alluded, the various reports that were made by the comptroller and street committee, and the admissions in the grant. That the filling had also been done appears from the report in 1803 and the maps that were made in 1807.

It is true that there is no evidence showing that the city ever adopted a plan after the passage of the act of 1798, or that any dates or times were specified within which Frederick Rhinelanders should do the filling. It does, however, appear from the maps that West street was laid out and that a permanent line was established beyond which no grants would be made. The provision of the statute providing for the fixing of a time within which the work was to be performed was for the purpose of enabling the city to enforce performance by causing the work to be done and charging the expense thereof upon the owner of the abutting land. This, however, could not be done until such owner had been given a reasonable opportunity to do the work himself. If, therefore, the owner was proceeding with reasonable despatch to perform under the act there would be no necessity for the city to give him notice to perform within a specific date or time, and inasmuch as no notice of that character is shown, we must assume that he performed under the act to the satisfaction of the officers of the municipality.

We thus have the provision of the act providing that he shall be entitled to become the owner of the spaces of ground in fee simple, and the resolution of the board of aldermen adopting the report of the street committee ordering a grant to be made upon the payment of the quit rent, etc., together with the fact that possession was taken and the lots filled up as indicated.

These facts would seem to indicate an equitable title, such as would pass by devise.

Undoubtedly there were some questions of difference as to rent reserved and the terms upon which the grant should be made, but these were matters which could easily have been

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determined by the court under the provisions of the act or the proceedings of the council.

A controversy as to the amount due upon a contract for the purchase of real estate would not prevent its passing by devise, subject of course to the payment of the amount that should be found due and owing. (*Livingston v. Newkirk, supra.*)

The defendant has alleged as a defense the Statute of Limitations and adverse possession. It appears that the possession of the premises in question after William Rhineland, Jr., was in William Rhineland as early as December, 1822, and March, 1823; that the premises were at such dates leased by him to James Wallace; that after his death his executors took possession thereof and leased the same from time to time until the death of William C. Rhineland in 1878, and that thereafter they were taken in charge by the receiver appointed in the partition action, and so held until they were set apart to the defendant herein.

It does not appear at what period the premises were first built upon, but it does appear that in 1848 the building now standing thereon covering the same was constructed, and that it took the place of an older building which previously existed thereon. During all the time that the premises were in the possession of the executor under the will of William Rhineland, the rents were collected with that of the other real estate held by him and the same divided among his children as provided for in the will.

It is claimed, however, that William Rhineland was the trustee of Mrs. Paulding, and that because of such trusteeship the statute would not run as against her. If it was a fact that he was her trustee as to the real estate in question, his possession thereof would, in the absence of any act or claim inconsistent therewith, be deemed to be that of his *cestui que trust*, and if he held the same as her trustee, his title would not have passed under his will to his executors, and if William C. Rhineland subsequently took possession and held the same adversely, any rights gained by such adverse holding would have descended to his heirs or passed to his

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devises, and would not have passed to the defendant under the will of her grandfather. But we do not understand that the referee has found or has been requested to find that William Rhinelanders was the trustee of Mrs. Paulding so far as this real estate was concerned. It does appear that prior to the marriage of William Paulding with Maria Rhinelanders, a contract of marriage was entered into between them wherein William Rhinelanders, Phillip Rhinelanders and Cadwallader D. Colden were constituted trustees with power to put certain moneys at interest and take securities therefor in their names as trustees for her benefit, etc. It also appears from the testimony of the plaintiff, Mrs. Dodge, that on one occasion on examining the contents of an old trunk filled with papers, which she received from her father upon his death, that she discovered a paper entitled "William Rhinelanders, trustee for the estate of Maria Rhinelanders, wife of William Paulding, in account," which paper contained a list of houses and lots, some of which were on West street, but that this paper was subsequently burned by her direction. She did not testify, neither is it found as a fact, that the property in controversy was mentioned in that paper. Whilst there was a trust pertaining to the moneys that she had before her marriage, there is no evidence or finding from which we can determine that it continued to the real estate in question.

We cannot, therefore, overrule the findings of the referee, but must regard the possession of William Rhinelanders as adverse to that of Mrs. Paulding. Mrs. Paulding was at the time of the death of William Rhinelanders under the disability of coverture. She however died in 1852, and her husband died in 1854.

Chapter 183 of the Laws of 1801, provided that "No action for the recovery of any lands, tenements or hereditaments shall hereafter be maintained, nor any avowry or cognizance be made unless on a seizin or possession of the hereditaments, either of the plaintiff or person making avowry or cognizance, or of the ancestor or predecessor of such plaintiff or person making avowry or cognizance within twenty-five

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years next before such action brought, or avowry or cognizance made; provided always that no part of the time during which the plaintiff or person making avowry or cognizance shall have been within the age of twenty-one years, insane, *femme covert*, or imprisoned, shall be taken as a part of said limitation of twenty-five years."

The Revised Statutes of 1830 continued in substance the provisions of the statute of 1801 with the exception that it reduced the period from twenty-five to twenty years and in reference to the persons disabled by reason of infancy, insanity, coverture or imprisonment, it provided that: "Such person may bring such action or make such entry, avowry or cognizance after the said time so limited and within ten years after such disability removed, but not after that period. If the person entitled to commence such action or make such entry, avowry or cognizance shall die during the continuance of any disability specified in the preceding section and no determination or judgment be had of the title, right or action to him accrued, his heirs may commence such action or make such entry, avowry or cognizance after the time in this article limited for that purpose and within ten years after the death, but not after that period." (2 R. S. 295, §§ 16, 17.)

The same was continued by the Code of Procedure of 1848. The disability of married women under the statute was removed by the Laws of 1870 (Chap. 741).

Mrs. Paulding left two sons, both of full age. They should have brought the action within ten years after the death of their father who would have had a life estate as tenant by curtesy. The action should, therefore, have been brought prior to February 17, 1864. (*Jackson v. Johnson*, 5 Cowen, 74; *Thorp v. Raymond*, 16 Howard [U. S.] 247-250; *Fleming v. Griswold*, 3 Hill, 85; *Carpenter v. Schermerhorn*, 2 Barb. Chr. 314; Tyler on Ejectment and Adverse Enjoyment, 932.)

Exceptions were taken to the admission in evidence of the petitions of Frederick Rhineland and William Rhineland, Jr., to the board of aldermen for the grant of these lands and also to the reception of the old maps and leases.

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It appears that upon the death of William Rhineland in 1825, he left a large landed estate in the city of New York, which for upwards of fifty years was under the chief management and control of his son and executor, William C. Rhineland, that during this period William C. had an office as executor in which there was a large safe, and that there was kept therein the deeds, maps, papers, books, etc., pertaining to the estate; that there were a large number of old deeds, books, leases and muniments of title. It was among these papers that the petitions, maps and leases were found. They were identified by persons connected with the office, who in that way had become familiar with the old papers and writings of the petitioners. The fact that petitions by these parties were actually made to the board of aldermen at the dates therein indicated appears from the record of the proceedings of such board. A careful examination failed to find the petitions on file among such proceedings. Under the circumstances we think these petitions were properly received in evidence as ancient writings, and as being the best evidence obtainable of the contents of the petitions presented to the board of aldermen; and the same may be said of the ancient maps and leases which were material as tending to show possession.

In 1 Phillips on Evidence (at page 281), it is said that ancient documents "are often the only obtainable evidence of ancient acts of possession which may be of great weight in the investigation of titles, and they naturally accompany and constitute a part of such acts."

In 1 Greenleaf on Evidence (§ 142) it is said: "The value of these documents depends mainly on their having been contemporaneous at least with the act of transfer, if not part of it. Care is first taken to ascertain their genuineness, and this may be shown *prima facie* by proof that the document came from the proper custody or by otherwise accounting for it. The documents found in a place in which and under the care of persons with whom such papers might naturally and reasonably be expected to be found, or in possession of persons having an interest in them, are in pre-

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cisely the custody which gives authenticity to documents found within it.”

In the case of *Hewlett v. Cock* (7 Wendell, 371), it was held that “a lease more than thirty years old may be read in evidence without proof of its execution, although there be no direct proof of possession accompanying it, if found among the title papers of the estate affected by it, and the facts and circumstances in reference to the property specified in it be such as to afford a reasonable ground of presumption of its genuineness.” (See also *Jackson v. Laroway*, 3 Johnson’s Cas. 283; *Enders v. Sternbergh*, 2 Abb. Ct. App. Dec. 31.)

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

AMERICAN STEAM BOILER INSURANCE COMPANY, Appellant and Respondent, v. EDWARD C. ANDERSON et al., Respondents and Appellants.

The power of an agent to create rights by contract for his principal includes an implied duty on his part to observe and not defeat or destroy those rights.

Plaintiff, an insurance company, entered into a contract with defendants to act as its agents in procuring insurance, and agreed to pay them thirty per cent of the premiums received on the policies obtained. Defendants induced H. & Co. to take out policies in plaintiff’s company, and they were paid their percentage of the premiums. Before these policies expired, defendants’ contract with plaintiff came to an end, and H. & Co., having been induced by defendants to insure in another company for which they had become agents, requested plaintiff to cancel their policies, which it did, and as provided by said policies returned to H. & Co. the premium unearned. *Held*, that plaintiff was entitled to recover of defendants the percentage received by them upon the amount of premiums so refunded; that although defendants’ agency had ceased, they were not at liberty to defeat the purpose or duration of the contracts of insurance to the prejudice of plaintiff, and retain all the fruits thereof received by them.

Reported below, 25 J. & S. 179.

(Argued October 8, 1891; decided December 1, 1891.)

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CROSS-APPEALS from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 6, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court and affirmed an order denying a motion for a new trial.

In June, 1884, by an instrument executed by the parties, the plaintiff appointed the defendants as its managers and general agents for the states of New York, New Jersey and Connecticut, with some local exceptions. The defendants were empowered to issue policies, and as commissions to have thirty per cent of the premiums received. Either of the parties to terminate the agency at pleasure on ninety days' notice. In December, 1885, a further arrangement was made to the effect that the agreement creating such relation should cease and determine on January 1, 1886, "and from that date be null and void," saving any claim the plaintiff should then have against the defendants for unpaid accounts. As such agents, the defendants in December, 1884, made two policies to R. Hoe & Co., insuring them to the amount of \$50,000 and \$25,000 = \$75,000, for three years upon buildings, engines, boilers, etc., against damages by explosion, for which a premium of \$1,125 was paid, of which the defendants retained \$337.50 for their commissions. Provision was made in the policies for their cancellation at any time at the request of the assured, and that in such event the plaintiff should retain the charges for inspection and the customary short rates for the term the policies had been in force. These policies were at the request of the assured canceled in March, 1887, and \$118.13 of the premium were returned by the plaintiff as required by the contract of insurance. The cancellation by R. Hoe & Co. was induced and procured by the solicitation of the defendants, who had then become the agents of the Hartford Steam Boiler and Inspection Company, and induced and procured that firm to take in place thereof insurance in the last-named company. In consequence of which the plaintiff was required to refund such portion of the premium. The purpose of this action was to recover damages of the defendants for thus causing the

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cancellation of the policies and the refunding of the amount repaid, for thirty per cent of which, with interest, a verdict was directed for the plaintiff.

Robert Sewell for plaintiff. Defendants violated a positive duty which they owed plaintiff, their principal, when they induced R. Hoe & Co. to cancel the policies in question; and plaintiff is accordingly entitled to recover. (2 Chitty on Cont. 804; Pom. Eq. Juris. §§ 959, 1077; *Carter v. Palmer*, 8 C. & F. 657; *Holman v. Loynes*, 4 DeG., M. & G. 270; *H. M. L. A. Soc. v. Brinker*, 77 N. Y. 445; Meachem on Agency, §§ 454, 455; *Northrup v. G. F. I. Co.*, 19 Am. Law Reg. 293; *Hinckly v. Arey*, 27 Me. 362; *Cotton v. Halliday*, 59 Ill. 176; *Watkins v. Consall*, 1 E. D. Smith, 65.) The plaintiff is entitled to recover from the defendants the amount which it lost through their violation of the duty which they owed the plaintiff. (Sedg. on Dam. [6th ed.] 400; Story on Agency, § 217; *Marzette v. Williams*, 1 B. & A. 415.)

T. Henry Dewey for defendants. There was no breach of duty on the part of the defendants. (1 Addison on Torts, 2, 13, 15, 19; Cooley on Torts, 60; *O'Callahan v. Cronan*, 121 Mass. 114; *Mahan v. Brown*, 13 Wend. 261; *Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 390, 394; *Randall v. Hazleton*, 12 Allen, 412; 1 Pars. on Cont. 86; Pom. Eq. Juris. §§ 959, 1077; *Cotton v. Holliday*, 59 Ill. 176; *People v. Township*, 11 Mich. 222; Meachem on Agency, § 455; *Mayor, etc., v. Cunliff*, 2 N. Y. 165; *Lossee v. Clute*, 41 id. 494; *Keeble v. Heckeringill*, 11 East. 576.) The several constructions and implications made by the General Term, the trial justice and the plaintiff's counsel, are erroneous. (*Beebe v. Johnson*, 9 Wend. 500; *Cobb v. Harmon*, 23 N. Y. 148; *Tompkins v. Dudley*, 25 id. 272; *Booth v. S. D. R. M. Co.*, 60 id. 487) The law never implies a contract where one is expressed (*Calkins v. Fulk*, 39 Barb. 620; *Dermott v. State*, 99 N. Y. 101; *Brant v. Geltson*, 2 Johns. Cas. 397; *Post v. Robertson*, 1 Johns. 31; *Beebe v. Bank of New York*, Id. 571; *Douglass v. Satterlee*, 11 id. 29; *Kent v. Welch*, 7 id. 258; *Vanderkarr*

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v. *Vanderkarr*, 11 id. 122; *Bell v. Dagg*, 60 N. Y. 530; *King v. Leighton*, 100 id. 386; 2 Greenl. on Ev. §§ 102, 103; 2 Addison on Cont. [ed. 1883] 54, 575; *Whiting v. Sullivan*, 7 Mass. 107; *M. G. Hospital v. Fairbanks*, 129 id. 78; Metcalf on Cont. 5, 6; 2 Pars. on Cont. 515; 1 id. 556; *Gavinzell v. Crump*, 53 Wall. 308; *Brown v. Spofford*, 95 U. S. 474; 1 Washb. on Real Prop. [4th ed.] 487; Story on Cont. § 11; *Church v. I. G. L. Co.*, 6 A. & E. 846-860; *Ogden v. Saunders*, 12 Wheat. 343; *Ex parte Ford*, L. R. [16 Q. B. Div.] 307.)

The function of a court in giving construction to a contract is exhausted in finding out what the parties to the contract meant by the language used. (*Shaw v. H. L. Ins. Co.*, 49 N. Y. 681; *Fudickar v. G. M. L. Ins. Co.*, 62 id. 392; *Hale v. B. L. Ins. Co.*, 120 id. 294; *A. C. Bank v. Leonard*, 40 Barb. 119; *Coleman v. Beach*, 97 N. Y. 553; *French v. Carhart*, 1 id. 102.) The courts will not make contracts for the parties which they have not made for themselves, nor will they impose conditions or restrictions upon parties to the contract. (1 Pars. on Cont. 556; *Post v. Robertson*, 1 Johns. 28; *Reynolds v. C. F. I. Co.*, 47 N. Y. 597; *Newell v. Wheeler*, 36 id. 253; *Tompkins v. Dudley*, 25 id. 272.)

Where parties enter into an agreement with express stipulations, there is a presumption that they have expressed all the conditions by which they intend to be bound.

(1 Washb. on Real Prop. 487; *Newell v. Wheeler*, 36 N. Y. 250.)

When a contract is drawn with technical accuracy and with obvious attention to details, and there is an absence of language tending to a conclusion that the covenant or promise sought to be set up was intended, such covenant or promise will not be implied. (*H. C. Co. v. P. C. Co.*, 8 Wall. 276; *Booth v. C. M. Co.*, 74 N. Y. 23; *Jugla v. Trouttet*, 120 id. 28.)

If a contract could be implied from circumstances, every circumstance bearing upon the question of the intent should be considered, and what interpretation is to be put upon the instrument in connection with the surrounding circumstances is a mixed question of law and fact. (*Blossom v. Griffen*, 13 N. Y. 575; *Knapp v. Warner*, 57 id. 668; *Clark v. N. Y. L.*

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I. T. Co., 64 id. 33; *Woodruff v. Woodruff*, 52 id. 53; *White v. Hoyt*, 73 id. 505; *Springsteen v. Sampson*, 32 id. 703; *Reynolds v. C. F. I. Co.*, 47 id. 597; *Coleman v. Beach*, 97 id. 553; *French v. Carhart*, 1 id. 102.) Whether the contract was susceptible of the construction, or the law makes an implication, as held by the General Term, it is plain that the agreement of the parties upon the cancellation of the contract was intended to settle, close and obliterate every relation and obligation arising out of the contract, with one exception. (*II. M. L. A. Soc. v. Brinker*, 77 N. Y. 435; *Hale v. B. L. Ins. Co.*, 46 Hun, 274; 120 N. Y. 294; *Shaw v. H. L. Ins. Co.*, 49 id. 681; *Fudickar v. G. M. L. Ins. Co.*, 62 id. 402; *Meyer v. Hallock*, 2 Robt. 284; *Fullager v. Reville*, 3 Hun, 600; *Baker v. Ludlow*, 2 Johns. Cas. 290; *Lambert v. Warner*, 8 Johns. 120; *Sill v. Village of Corning*, 15 N. Y. 306; *Quinn v. Hardenbrook*, 54 id. 88; *Smith v. B. S. Bank*, 101 id. 62; *Herring v. N. Y., L. E. & W. R. R. Co.*, 105 id. 389; *People v. Angle*, 109 id. 575; 4 Abb. Dig. 323; *Newell v. Wheeler*, 36 N. Y. 244.)

BRADLEY, J. There was upon the evidence no controversy of fact, but the questions presented had relation to the legal consequences, as between the parties, of the action of the defendants in inducing and procuring the assured to surrender the plaintiff's policies of insurance, and to demand a rebate of the premium paid to it. The motive of the defendants for doing this does not appear further than may be implied from the fact that the defendants also induced R. Hoe & Co., the assured, to take in lieu thereof insurance in the Hartford Steam Boiler Insurance Company, which the defendants then represented. Their relation of agency to the plaintiff had terminated by the terms of their contract with it in that respect, and they had rightfully become the agents of the rival company in the business of like insurance. Their relation with the latter company required the defendants to subserve its interest faithfully and diligently; and consistently with that relation, it was in the line of their duty to induce R. Hoe & Co. to take insurance in the company the defendants then rep-

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resented. But the question is whether any consideration was due from them for the contracts they had, as agents for the plaintiff, made while they held that relation to it. They had, pursuant to such agency and for it, insured the property of Hoe & Co., and that was done under a contract by which they were entitled to and did receive thirty per centum of the premiums paid. This was compensation for their skill and services as agents of the plaintiff. Although their fiduciary relation to the plaintiff had terminated, the contract of insurance they in that character had made with the assured, remained only partially executed, the time of its indemnity had not expired, and as a consequence the premiums paid were not fully earned. The defendants had, pursuant to their contract of agency with the plaintiff, received thirty cents of every dollar of those premiums. They received this from the plaintiff in consideration of the services by them performed in its business and behalf by virtue of the contract between them. The policies of insurance were made subject to the right reserved to the assured of surrendering them and having a rebate and reimbursement *pro tanto* of the premiums paid; and this without prejudice to the defendants since they had fully performed the services of creating the relation of insurer and assured. This is all they undertook to do for their stipulated compensation. But when they had accomplished this were they at liberty to defeat the purpose or duration of the contract of insurance and retain the fruits of it to the prejudice of the plaintiff? It quite clearly seems that they could not do so without failure to observe their obligation arising out of the contractual relation which they had assumed with the plaintiff and pursuant to which they made for it the contract of insurance. When their agency for the plaintiff terminated the unearned portion of the premium upon the Hoe & Co. policies existed in the contract executory in character, and of which the defendants had received thirty per centum by virtue of their contract with the plaintiff. There is no well supported principle which would enable them to take from the plaintiff the benefit of the contract of insurance it had through them made, and retain the

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portion of the consideration received by them, and which they had caused the plaintiff to restore to the assured. The question was not one of disability arising out of fiduciary relation; that had ceased to exist between the parties. It was one founded in contract pursuant to which the defendants had received compensation out of the proceeds of the transaction measured by the term of indemnity, and by causing the defeat of the operation of the contract of insurance they had created, before its stipulated period expired, and thus requiring the plaintiff to rebate a portion of the premium, they caused a partial failure of consideration of the contract they assumed to perform, and to the extent at least of the amount received by them of the sum which the plaintiff was thus required to refund, they became liable to reimburse it. The power of an agent to create rights by contract for his principal includes an implied duty to observe and not to defeat or destroy them. The facts in the present case did not necessarily require the conclusion of bad faith on the part of the defendants, although it may have been permitted. Nor was the action tried by the court upon the theory that they were chargeable with that imputation; and for that reason if for no other, there was no error or prejudice in the exclusion of certain evidence offered by the defendants. And the question was finally treated by the parties at the trial as one of law only. In that view the measure of damages as founded upon the contract between the parties, by which the defendants' agency was created and pursuant to which they issued the policies, was that which the court adopted in the direction of the verdict. And that amount the plaintiff was entitled to recover.

In legal contemplation the relief of the plaintiff from its contract of insurance was of some value to it at the time the policies were canceled, although it turned out that no loss would have been suffered if they had continued effectual until the end of the term for which they were issued.

The judgment should be affirmed, without costs in this court to either party.

All concur.

Judgment affirmed.

Statement of case.

SPENCER D. C. VAN BOKKELEN, Respondent, v. ROBERT H.
BERDELL, Appellant.

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150	861

Upon the trial of an issue of fact by a referee or by the court without a jury, a refusal to make any finding whatever upon a question of fact, where a request to find is seasonably made by either party, or a finding without any evidence tending to sustain it, is a ruling upon a question of law (Code Civ. Pro. § 998), and, when duly excepted to, serves as a notice to the respondent of an intention to raise on appeal a question of legal error and puts upon him the responsibility of adding, by amendment to the case, any omitted evidence on the question.

In an action for an accounting between partners one of the schedules of the account consisted of items claimed to have been paid by defendant for repairs to real estate purchased by the firm, but title to which was taken in the name of defendant. Defendant was asked if he paid the items in said schedule; this was excluded on plaintiff's objection. Previous to this it had been shown that the case had been tried partially before another referee, who died before the trial was completed; defendant testified that he had vouchers for the payments made by him which had been left with the former referee; that he had been informed by the person in charge of said referee's office that they had been transmitted to the new referee, and that the latter had not been able to find them. *Held*, that the evidence was competent and its exclusion error.

Plaintiff was asked and permitted to answer under objection and exception, as to what facts were shown upon the trial before the former referee. He testified the facts shown were that defendant made a mortgage on said real estate, which was not recorded for a long time after. *Held*, that the evidence was incompetent, as it was plaintiff's conclusion as to what was proved before the former referee; that it was important, as it tended to show that defendant had encumbered the property, and so the error required a reversal.

While a witness may be discredited by showing his conviction for an offense, it is not competent to discredit him by showing simply that he has been indicted.

(Argued October 12, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1888, which affirmed a judgment in favor of plaintiff entered upon the report of a referee, to whom the

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case had been referred, to take and state an account upon an interlocutory judgment.

The nature of the action and the facts, so far as material, are stated in the opinion.

Philip L. Wilson for appellant. It was the duty of the respondent to see that all the testimony was in this case necessary to sustain the findings of fact of the referee. (*Perkins v. Hill*, 56 N. Y. 87; *Spence v. Chambers*, 39 Hun, 193; *Porter v. Smith*, 35 id. 118.)

Wm. W. Niles for respondent. An error in the admission or exclusion of evidence, or in any other ruling or direction of the judge, upon the trial, may, in the discretion of the court which reviews it, be disregarded if that court is of opinion that substantial justice does not require that a new trial should be granted. (Code Civ. Pro. § 1003; *Church v. Kidd*, 3 Hun, 254; *Flack v. Vil. Green Island*, 122 N. Y. 107.) The rule as to entries is: "If a party uses books of account against his adversary, the whole relating to the same matter is admissible." (*Pendleton v. Weid*, 17 N. Y. 76; *Garvey v. Nicholson*, 24 Wend. 353; *Rouse v. Whited*, 25 N. Y. 173.)

HAIGHT, J. Under a stipulation of the parties the interlocutory judgment is to stand, and the only questions brought up for review pertain to the accounting thereunder.

It appears that the plaintiff and defendant were copartners doing business under the firm name of Robert H. Berdell & Co.; that they dissolved on the 30th day of September, 1858, each signing the following statement entered in the books of the company: "The undersigned have this day dissolved partnership by consent; either party will sign in settlement. Store and office furniture and fixtures, books of account, papers, etc., to be the property of Robert H. Berdell. New York, September 30, 1858."

It appears that, during the continuance of the copartnership, certain real estate had been acquired by the company, the title

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of which was taken in the name of the defendant, for which in the interlocutory judgment he was ordered to account for the rents, issues and profits, after being credited with all amounts paid in relation thereto.

It further appears that upon the house and lot known as 96 Dean street there was a mortgage for twenty-five hundred dollars, and upon the ten lots known as the Perry lots there was a mortgage for \$3,300. The defendant testified that both of these mortgages had been paid by him, and he was corroborated in this statement by the testimony of Mr. Middleton, who held the twenty-five hundred dollar mortgage, and by the production of his check book and satisfaction pieces. There is no pretense that the mortgages were paid by the plaintiff or by any person other than the defendant. It is suggested that the defendant has encumbered the premises with another mortgage, but whether the same has been paid or is now a lien upon the premises does not appear. If he has encumbered the premises by another mortgage, the plaintiff may be entitled to relief in reference thereto, but we do not understand that that fact would deprive the defendant of his right to be credited with the amount paid in satisfaction of the previous existing mortgages. The referee, on request, refused to find that either of these mortgages had been paid.

It is suggested that there is no certificate that the case contains all of the evidence. But upon the trial of an issue of fact by a referee or by the court without a jury, a refusal to make any finding whatever upon a question of fact where a request to find thereupon is seasonably made by either party, or a finding without any evidence tending to sustain it, is a ruling upon a question of law. (Code C. P. § 993.) And a ruling upon a question of law duly excepted to, serves as a notice to the respondent of an intention to raise a question of legal error, and puts upon him the responsibility of adding by amendment any omitted evidence on the question. (*Halpin v. Phenix Ins. Co.*, 118 N. Y. 165.)

The appellant, however, has neglected to take an exception to the refusal of the referee to find that these mortgages

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were paid. The exception taken is to the finding of the referee that the defendant had paid upon the Dean street house for interest, taxes, premium insurance, moving factory and repairs the sum of \$2,101.70, on the ground "that said finding does not embrace all the payments made on said property by the defendant to the credit of which he is entitled, and on the ground that said finding is too general and should specify what payments are embraced therein." A similar exception was also taken to the finding that was made in reference to the Perry lots. Whether these exceptions are sufficiently specific to raise the question for review in this court we shall not stop to consider, for there are other exceptions upon which we prefer to rest our decision.

The referee appears to have tried the case upon the erroneous theory that the defendant's testimony was not competent for the purpose of proving items of payments, upwards of twenty dollars in amount, unless he first produced a voucher therefor or other evidence of payment. Upon this theory very much of his evidence was ruled out. As to many of the payments which he claimed to have made upon the premises he was able to produce other evidence, and then his testimony appears to have been admitted, but as to some of the payments claimed by him to have been made he was unable to furnish other testimony, and was consequently compelled to submit the case without evidence as to such payments.

Schedule D of defendant's account as rendered was for items of repair upon the premises during the years 1863, 1864, 1865 and 1866. He was asked if he paid the items embraced in this schedule to Mr. Skinner. The plaintiff objected, the objection was sustained, and an exception was taken. It appeared that Skinner was in his employ as agent, and that he paid him for taking care of the premises and making repairs thereon. The defendant subsequently testified to making a number of the payments embraced in this schedule, but that evidence was, upon the motion of the plaintiff's attorney, stricken out by the referee. The case had been partially tried before Lawrence, another referee, who had died before the

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conclusion of the trial. The defendant had testified that he had vouchers for payments made and that they were left with the former referee; that he had been to his office to get them, and was informed by the person in charge that they had been transmitted to the new referee; that he had not since been able to find them. It appears to us that the evidence was competent and should have been received.

The plaintiff, in giving his testimony, was called upon to state what facts were shown upon the trial before Referee Lawrence. This was objected to by the defendant, as incompetent, the objection was overruled and an exception was taken. The witness answered that the facts shown were that the defendant made a mortgage on the property in favor of S. C. Parkhurst; that the mortgage was not put on file for a long time after, etc. It appears to us that this evidence was incompetent. The plaintiff was thus permitted to give his conclusions as to what had been shown upon a former trial before another referee. The evidence given was important, for it tended to show that the defendant had encumbered the property with a mortgage other than those existing at the time the property was purchased.

The defendant, upon his cross-examination, was asked if he was under indictment for perjury. This question was objected to, the objection was overruled and an exception taken. He was compelled to answer that he had been told so but that he had not seen the papers. Whilst a witness may be discredited by showing his conviction for an offense, we do not understand it to be competent to discredit him by showing that he has been indicted. (*People v. Crapo*, 76 N. Y. 288; *Ryan v. People*, 79 id. 593; *People v. Noelke*, 94 id. 137-144; *People v. Irving*, 95 id. 541-544.)

The rules of evidence in civil cases are applicable also in criminal cases, except as otherwise provided by law. (Code Criminal Procedure, § 392; *Kober v. Miller*, 38 Hun, 184.)

The appellant claims that he should have been allowed for a balance due him upon account as shown by the books at the time of the dissolution of the copartnership; that he also

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should be allowed for water taxes paid, but we have not thought it necessary to consider these or the other questions raised, for upon a new trial further evidence may be given.

The final judgment entered upon the interlocutory judgment should be reversed, and a new accounting had as provided for in the interlocutory judgment, with costs to abide the final award of costs.

All concur.

Judgment accordingly.

180	146
154	691

WILLIAM B. HAYDEN et al., as Survivors, etc., et al., Appellants, v. THE NATIONAL BANK OF THE STATE OF NEW YORK, Respondent.

Where property is sought to be attached under and in pursuance of the provisions of the Code of Civil Procedure (§ 649, subd. 3), declaring that property not capable of manual delivery may be attached by leaving with the person holding it, or if it consists of a demand other than a bond, promissory note, or other instrument for the payment of money, with the person against whom it exists, a certified copy of the warrant, with a notice showing the property attached, such person must look to the notice to ascertain what property is attached and base his action thereon.

It is of no consequence what knowledge the person may have as to the particular property intended to be attached, unless such knowledge is derived from the notice, and unless there is a substantial compliance with the statute, title to the property is not divested and the holder thereof remains liable to the owner.

In an action brought by plaintiffs to recover an amount due a firm upon a deposit account with defendant's bank, which plaintiffs claimed to have attached in an action against said firm; the sheriff, in attempting to levy, delivered to defendant's cashier a copy of the warrant; this showed that the action was against the firm. Upon it was indorsed a notice that by it the sheriff was commanded to attach all the property of L., one of the firm, within his county, and that by virtue thereof he attached any moneys due or belonging to L., or any of his property in its possession. *Held*, that the notice was insufficient to attach, and could not be made the foundation of a proceeding to divest the title of the firm to, any funds on deposit with defendant; that defendant could only look to the notice to ascertain the property levied on and was not bound to read the warrant with it; also, that the notice was insufficient to attach the interest of the partner named in

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the deposit, as it did not specify such an interest, and as the complaint in the attachment suit did not seek to recover on such ground.

Greentree v. Rosenstock (61 N. Y. 583), explained and criticised.

(Argued October 15, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1889, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

The plaintiffs Hayden and Allen were creditors of the firm of G. H. Loker & Brother, residents of and doing business at St. Louis, Mo., and on the 9th day of October, 1878, commenced an action against said firm and obtained therein an attachment against their property, which attachment was on the following day delivered to the plaintiff Reilly, then the sheriff of the city of New York. The Christian names of the members of said firm were unknown to the plaintiffs, and in the summons and writ of attachment they were described as G. H. Loker and ——— Loker.

The writ of attachment was in the usual form and commanded the sheriff to attach so much of the property which the said G. H. Loker and ——— Loker had within his county as would satisfy the plaintiffs' demand.

The said firm had an account with defendant under the name of G. H. Loker & Bro., and on the tenth day of October, the sheriff attempted to serve said attachment upon the defendant by delivering to its cashier a certified copy of the warrant upon which was indorsed a notice to the effect that by it the sheriff was commanded to attach all the property of the defendant G. H. Loker within his county, and that having been informed that the said bank had in its possession certain moneys belonging to said defendant and was indebted to him, he particularly attached and required to be delivered and paid over to him the said money and any property of said defendant in possession or under control of said bank. Having read over the attachment and notice, the cashier informed the sheriff

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that they had no account against G. H. Loker and blank Loker, but that they had an account against G. H. Loker & Bro., and that they would send a certificate to the sheriff that afternoon. At that time the bank was indebted to G. H. Loker & Bro. in a sum upwards of \$2,000, and this amount was subsequently applied by the bank to the payment of a note upon which said Loker & Bro. were liable, and which matured on October twelfth.

This action was brought to recover the amount of the bank's indebtedness to Loker & Bro.

After proof of the foregoing facts, the trial court dismissed the complaint.

George A. Strong for appellants. Subdivision 3 of section 649 of the Code of Civil Procedure does not establish the invalidity of appellant's claim. (*People v. A. R. R. Co.*, 125 N. Y. 516; *People ex rel. v. Gilon*, 126 id. 155.) The sufficiency of the notice depended upon the general principles of the law of notices. (1 Story's Eq. Juris. § 400; *Ellis v. Horrman*, 90 N. Y. 473; *O'Brien v. M., etc., Co.*, 56 id. 57; *Gates v. Beecher*, 60 id. 527; *Douglass v. Howland*, 24 Wend. 41; *Arthur v. Morgan*, 112 U. S. 501; *W., etc., Co. v. Clinton*, 66 N. Y. 331; *Hinneman v. Rosenback*, 39 id. 101; *Merriam v. U. S.*, 107 U. S. 437; *Cragin v. Lovell*, 88 N. Y. 262; *Hamilton v. Taylor*, 18 id. 360.) The notice and levy were good, because the bank, as appears from the evidence, actually understood exactly what was really meant by the notice. (*Hodges v. Shuler*, 22 N. Y. 119; *Gates v. Bucher*, 60 id. 527.) The authorities involving attachments, so far as they go, sustain this appeal. (*O'Brien v. M., etc., Co.*, 56 N. Y. 54; *People ex rel. v. Post*, 50 Hun, 247; *Wehle v. Connor*, 69 N. Y. 546.)

Joseph Larocque for respondent. The remedy by attachment is a purely statutory remedy, and to obtain the benefit of that remedy the provisions of the statute must be strictly followed. (Code Civ. Pro. § 649, subd. 3; *Kelly v. Roberts*, 40

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N. Y. 432; *Clarke v. Goodridge*, 41 id. 210; *O'Brien v. M. & T. F. I. Co.*, 56 id. 52; *Greentree v. Rosenstock*, 61 id. 583.) Under the warrant in evidence the appellants had the right to levy on any joint property of the two defendants named in the warrant, or on individual property of either. They elected, through the sheriff, by the notice prescribed by the statute served with the copy warrant, to limit their levy to individual property of one defendant, G. H. Loker, and so notified the respondent, and by that election they are bound. (*O'Brien v. M., etc., I. Co.*, 56 N. Y. 56.)

BROWN, J. The right of the plaintiffs to recover in this action depended upon the question whether the proceedings taken by them against the firm of G. H. Loker & Brother were effectual to attach the funds of that firm on deposit with the defendant. When the defendants in an action are non-residents of the state, as in the present case, they may have no actual notice of an attachment proceeding and their property is taken without an opportunity for them to be heard. Under such circumstances it would seem that there could be no question but that the attaching creditor should substantially comply with the statute regulating such proceedings. It can be of no consequence what knowledge the holder of the attached property may have as to the particular property intended to be attached, unless such knowledge is derived from the notice required by the statute to be served upon him, and unless there is a substantial compliance with the statute title to the property is not divested and the holder thereof remains liable to the owner.

The Code provides in section 649, sub. 3, that property not capable of manual delivery may be attached by leaving with the person holding the same or, if it consists of a demand other than a bond, promissory note or other instrument for the payment of money, with the person against whom it exists, a certified copy of the warrant of attachment and a notice showing the property attached.

The sheriff in this case left with the bank a certified copy of the warrant and a notice specifying that the property

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attached was money or other property in possession of the bank belonging to the defendant G. H. Loker. This notice was plainly insufficient to attach money due G. H. Loker & Brother and could not be made the foundation for a proceeding to divest the title of the firm to any funds on deposit with the bank. And had the bank paid over to the sheriff under that notice the amount of the firm's deposit, it could not be held thereby to have discharged its indebtedness, but would still have remained liable therefor to the firm. The claim that the notice was effectual to attach the interest of G. H. Loker in the deposit cannot prevail, as it did not specify such an interest, and the complaint did not seek to recover upon such ground.

The plaintiffs ask a reversal on the ground that the warrant and notice were to be read together, and that so taken they informed the bank that the plaintiffs' claim was against the firm, and hence it must be held that they knew that it was the firm property that it was intended to attach. We may assume such to be the fact. But the statute requires the service of both the warrant and the notice, and it is to the latter that the holder of the property must look to ascertain what property is attached, and upon that paper he must base his action. If the proceedings are regular and the court has jurisdiction to grant the warrant, he may discharge his indebtedness to his creditor by paying over or delivering the property specified in the notice to the officer executing the writ in the attachment suit, but if he pays or delivers property not specified in the notice, then the proceedings afford him no protection, and his indebtedness to his creditor is not discharged.

In view of the plain provision of the Code, the cases relating to the sufficiency of a notice to charge an indorser of a promissory note are not applicable here.

The holder of the attached property must derive his knowledge of the object in serving him from the notice, and knowledge or information received from other sources is of no importance.

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This view has some support in the case of *Greentree v. Rosenstock*, 61 N. Y. 583. That case involved the question whether a notice served on the defendant to the effect that all credits of Strauss, Hartman & Hofflin in defendant's possession were attached, and under which the defendant paid to the sheriff moneys in his hands belonging to Hofflin individually was sufficient to discharge his indebtedness to Hofflin. The Commission of Appeals held that it was not.

The appellant criticizes that case on the ground that it conflicts with *O'Brien v. Merch. & Traders' F. Ins. Co.* (56 N. Y. 52). To the extent of holding that a notice to be good must specify the particular property intended to be attached, and that a notice in general terms was insufficient, the case is subject to the criticism made against it, and the court apparently overlooked the case referred to. But not so in reference to the point now under discussion. In addition to what was said on the subject of notice couched in general terms, the court said: "The sheriff referred to the subject of the attachment as though it were the property of the firm of which Hofflin was a member, instead of the property of Hofflin himself. * * * The notice was plainly insufficient, and the defendant was under no obligation to give heed to it."

Here the sheriff referred to the subject of the attachment as the individual property of G. H. Loker, and not to the property of the firm. He might have made his notice in general terms, so as to include the property of the firm and of either member thereof, but having limited it to the property of one member, it was insufficient to reach the deposit due to the firm, and the defendant was justified in giving no attention to it.

The judgment should be affirmed, with costs.

All concur, except POTTER, J., dissenting.

Judgment affirmed.

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**THE BUFFALO STONE AND CEMENT COMPANY, Respondent, v.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY, Appellant.**

Where, in an equity action, no objection is raised by answer or upon trial that such an action is not the appropriate remedy, the objection is not available upon appeal.

The provision of the General Railroad Act (§ 44, chap. 140, Laws of 1850), requiring corporations organized thereunder to "erect and maintain fences on the sides of their road * * * with openings or gates or bars therein, and farm crossings of the road for the use of the proprietors of lands adjoining such railroad," was designed to compel such corporations to construct and maintain such crossings over their lines as are necessary to enable owners, having land abutting on either or both sides of the road, to reach and work their properties.

The statute does not limit the right of adjoining owners to crossings solely for agricultural purposes, but they may be ordered to enable owners to remove the natural products of the land, or stone, minerals, etc., therefrom.

Nor is the right limited to a proprietor, a strip of whose land has been taken for the road, leaving remaining portions adjoining such strip on both sides.

While the provision of the act of 1864 (§ 2, chap. 582, Laws of 1864), requiring the lessee of a railroad to "maintain fences on the sides of the road so leased * * * with openings or gates or bars therein at the farm crossings of such railroad, for the use of the proprietors of the lands adjoining such railroads," does not expressly require such lessee to build and maintain farm crossings, yet it is the duty of such a lessee in possession, with power to make repairs and additions, to construct necessary farm crossings.

This obligation is not confined to domestic corporations or those organized under the General Railroad Act, but applies to a foreign corporation which, under authority given to it by statute, has leased and is operating a road in this state, and has covenanted by its lease to perform all things in connection with the road which the lessor might be required to perform.

Where, therefore, defendant, a corporation organized in another state, having been authorized by statute (Chap. 244, Laws of 1855) to contract with corporations in this state and to sue and be sued in its courts, leased the road of a railroad corporation of this state, the lease containing a provision requiring the lessor "to do and perform all acts and things" which the lessor "would be bound by law to do and perform" had the lease not been made, *held*, that the duty of constructing farm crossings, in the cases prescribed, was imposed upon it.

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Plaintiff is the owner of a farm through which, before the construction of defendant's road, another railroad corporation, the E. R. Co., had constructed its road, the grade of which was about on a level with the natural surface of the ground. The road cut off the larger portion of the farm, upon which were stone quarries, from the highway; to give access to this, a grade crossing was constructed where a farm road crossed the tracks. The road so leased by defendant was laid out across said portion of the farms parallel with and a short distance from the other road. The owners of the farm, conveyed to the E. R. Co. the strip between the two roads, reserving a way across in continuation of the way in use. The bed of defendant's road was raised above the surface of the ground, and where it crossed the farm road the elevation was about thirteen feet. Plaintiff demanded that an under crossing be constructed in continuation of the other crossing, so as to give access to said portion of its farm; this defendant refused, but built an over crossing at a point where the grade of its road came near the natural surface, about 550 feet away from the original crossing. In an action to compel the construction of an under crossing as required, *held*, the facts justified a finding that a suitable crossing had not been built; that the questions where and how one should be built, and whether under or over defendant's tracks, were questions of fact for the trial court, and there being evidence to sustain its findings in these respects, and it appearing that it had fairly exercised its discretion, its determination could not be disturbed here.

(Argued October 15, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made November 19, 1889, which affirmed a judgment in favor of plaintiff directing the construction of an under farm crossing, entered upon a decision of the court on trial without a jury.

The plaintiff owns a farm, which, before any part of it was taken by railroads, contained about 100 acres, and is situated on the east side of Main street in the city of Buffalo. In 1870, the Erie Railway constructed a railroad through this farm, so dividing it that there are about fifteen acres between the land of the railroad and Main street, and about eighty-five acres east of the railroad. The bed of this railroad is raised but slightly above the natural surface of the ground, and to enable the owners of the land to reach and use the eighty-five acres, a grade crossing was constructed where a farm road known as Hewitt street crosses the track. In 1881, the New

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York, Lackawanna and Western Railway Company, a corporation organized under the laws of the state of New York, laid out and mapped the right of way for a railroad across this farm, parallel to and about seventy feet east of the line of the land of the Erie, and began proceedings to acquire the property by condemnation. While these proceedings were pending, the owners of the farm conveyed to the Erie the strip of land lying between its right of way and that which the New York, Lackawanna and Western Railroad was seeking to acquire; reserving, however, a way across it in continuation of the way then in use over the railroad. In March, 1882, the New York, Lackawanna and Western Railway Company acquired by condemnation a strip of land ninety-nine feet wide through this farm, which is bounded on the west by the land of the Erie Railway, and on the east by the land of the plaintiff. Shortly afterwards, a railroad was constructed, having its bed raised several feet above the natural surface of the ground, and where it crosses the farm road, used in connection with the Erie crossing, the roadway is about thirteen feet above the surface.

On the 2d day of October, 1882, the New York, Lackawanna and Western Railway Company leased its line to the Delaware, Lackawanna and Western Railroad Company for 499 years, since which time the latter corporation has been in possession and engaged in operating the road. The plaintiff demanded that an under crossing be constructed in continuation of the Erie crossing so as to enable it to reach and occupy the land east of the defendant's line. The defendant refused to construct a crossing at this place, but built an over crossing about 550 feet away from the original crossing and at a point where the grade of the railroad approaches near to the natural surface of the land.

This action was begun by Mary Shultz, a former owner, to compel the construction of an under crossing in continuation of the Erie crossing; but afterwards, she conveyed the premises to this plaintiff, and it was substituted in her stead. The Special Term, before which this action was tried, ordered the

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construction of an under crossing at the place designated by the plaintiff; which decision was affirmed by the General Term, and thereupon the defendant appealed to this court.

John G. Milburn for appellant. An action of this nature will not lie to compel a railroad company to perform its statutory duty to construct farm crossings. (*Jones v. Seligman*, 81 N. Y. 190; *Wademan v. R. R. Co.*, 51 id. 568; Pom. on Spec. Perf. § 1401; High on Ex. Rem. §§ 25, 276, 277; Laws of 1850, chap. 140, § 44; *People v. R. R. Co.*, 58 N. Y. 152; *People ex rel. v. Cummings*, 72 id. 433; *People ex rel. v. Medical Society*, 32 id. 185; *People v. Gas Light Co.*, 1 Abb. Pr. 404; *People v. Mayor, etc.*, 10 Wend. 305; *Thompson v. R. R. Co.*, 6 Wall. 134; *Van Norder v. Morton*, 99 U. S. 378; *Beck v. Allison*, 56 N. Y. 366.) The plaintiff was not an adjoining proprietor within the meaning of the statute. (Laws of 1850, chap. 140, § 44; *People v. Colgate*, 67 N. Y. 512; *School v. Risely*, 10 Wall. 91; *Saulet v. Sheperd*, 4 id. 502; *Banks v. Ogden*, 2 id. 57.) The under-crossing ordered was not in any sense a farm crossing or one which the statute allowed. (*Jones v. Seligman*, 81 N. Y. 190; *Wademan v. R. R. Co.*, 51 id. 568; *Clarke v. R. R. Co.*, 18 Barb. 350.) The plaintiff did not make a case for specific performance. (*Day v. Hunt*, 112 N. Y. 195; *Conger v. R. R. Co.*, 120 id. 29.) This action will not lie against the defendant as the lessee of the New York, Lackawanna and Western Railway Company. (Laws of 1854, chap. 282; *In re N. Y., L. & W. R. R. Co.*, 99 N. Y. 21; *Wheat v. Rice*, 97 id. 302; *Miller v. R. R. Co.*, 125 id. 118.) We were entitled to a determination of the question whether or not a farm crossing should be built as demanded on proper evidence. This rule applies to an equity case tried before a judge. (*Foote v. Beecher*, 78 N. Y. 155.)

James C. Strong for respondent. The motion of the defendant to dismiss the complaint upon the ground that it does not show any right, title or interest in the plaintiff, is not tenable.

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(*Schell v. Devlin*, 82 N. Y. 333; *Smith v. Zalinski*, 94 id. 519; *Gibson v. Bank*, 98 id. 87, 88; 7 Abb. [N. C.] 194; 26 Hun, 225; *Brooman v. Turner*, 69 N. Y. 280; *Hand v. Kennedy*, 83 id. 149; *Little v. Banks*, 85 id. 258; *Todd v. Weber*, 95 id. 181.) The exceptions of the defendant to the ruling of the court allowing the plaintiff to give evidence tending to show the kind, quality and quantity of stone on the premises, and that the expense of hauling stone over the crossing claimed to have been made by the defendant, is greater than if hauled over a crossing to be built at Hewitt street, is without merit. (18 Barb. 350.) The court in banc is bound to assume that the court, at Special Term, which made this order, made it upon the proper papers. (Code Civ. Pro. § 3253; *Darling v. Brewster*, 55 N. Y. 667; *Cowins v. Supervisors, etc.*, 3 T. & C. 296; 16 Abb. Pr. 465; *Lattimer v. Livermore*, 72 N. Y. 174.) The question of a farm crossing, or for damages for not making and maintaining a proper one, is not one that a commission appointed to condemn the land and award damages to the owner can consider. (*Jones v. Seligman*, 81 N. Y. 190-198; *Wheeler v. R. & S. R. R. Co.*, 12 Barb. 227.) Defendant is required by law to build a farm crossing, it being incorporated under the laws of the state of Pennsylvania, and operating its road under said lease from the New York, Lackawanna and Western Railroad Company. (*Clarke v. R. L. & N. F. R. R. Co.*, 18 Barb. 350.) The crossing defendant claims to have made for the use of plaintiff is not a proper one and one that complies with the laws relating to farm crossings. (*Wademan v. A. & S. R. R. Co.*, 51 N. Y. 568; *Smith v. N. Y. & O. M. R. R. Co.*, 63 id. 58; *Jones v. Seligman*, 81 id. 190; *Wheeler v. R. & S. R. R. Co.*, 12 Barb. 227.)

FOLLETT, Ch. J. The learned counsel for the appellant strenuously argued that this action in equity is not, but that a mandamus is, the appropriate remedy to compel a railroad corporation to construct a crossing pursuant to the statute. This objection not having been taken by the answer, or on the

trial, is not available in this court. (*Town of Mentz v. Cook*, 108 N. Y. 504.)

For defenses on the merits, the defendant insists: (1) That the plaintiff is not an adjoining proprietor; (2) That, being a foreign corporation and lessee of the railroad, it is under no obligation to build a farm crossing; (3) That the crossing ordered by the judgment is not a farm crossing, within the statute.

The statute provides: "Every corporation formed under this act shall erect and maintain fences on the sides of their road, of the height and strength of a division fence required by law, with openings, or gates, or bars therein, and farm crossings of the road for the use of the proprietors of lands adjoining such railroad." (§ 44, chap. 140, L. 1850.) It is also provided: "And when the railroad of any railroad corporation shall be leased to any other railroad company, or to any person or persons, such lessees shall maintain fences on the sides of the road so leased, of the height and strength of a division fence, as required by law, with openings, or gates, or bars therein, at the farm crossings of such railroads, for the use of the proprietors of the lands adjoining such railroads." (§ 2, chap. 582, L. 1864.) The land of this plaintiff adjoins on the east the land whereon the road is built, and without a crossing, it is impossible to reach the plaintiff's land from the street for any purpose. The defendant's contention seems to be that an owner has no right to a crossing, unless the road so divides the tract that the remaining land adjoins on both sides of the strip taken for the railroad. This was not the intention of the statute. Take the case of a farm abutting on a public highway, as this one did, and the corporation, instead of acquiring its right of way some little distance from the street, takes one along side of the highway, so that one of the exterior lines of the land taken coincide with one of the boundary lines of the farm. In such a case, the land is not divided, but the land not taken is as effectually cut off as though land remained on both sides of the road. Again, which is this case, two parallel and contiguous railroads are

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built at different times through a farm. The owner has a right to a crossing over the road first built, but it is urged that in case another is constructed by the side of the first he has no right to compel the latter to build a crossing over it. The statute is not capable of any such narrow construction, its design being to compel such corporations to construct and maintain such crossings over their lines as are necessary to enable owners having land abutting on either or both sides of the road to reach and work their properties.

By chapter 244 of the Laws of 1855, this defendant is authorized, in the prosecution of its business, to make contracts with any corporation in this state, and to sue and be sued in its courts. Under that statute, the defendant leased from the New York, Lackawanna and Western Railway Company, for 499 years, its entire property then owned, or thereafter to be acquired, with all the franchises, immunities, rights, powers and privileges which had been then granted, or which should be thereafter granted, to the lessor. The lease, among other provisions, contains the following: "And the said party of the second part (defendant) shall, during the continuation of this indenture, use and operate the said railroad and do and perform all acts and things which the party of the first part, as owners of the property and franchises hereby demised, would be bound by law to do and perform had this indenture not been made."

It is true that the section above quoted from the act of 1864, which imposes certain duties upon lessees of railroads, does not, in express terms, require them to build and maintain farm crossings. But they are, however, expressly required to build and maintain division fences, with openings having gates or bars therein, at farm crossings. In *Jones v. Seligman* (81 N. Y. 190), a railroad corporation mortgaged its property to trustees to secure the payment of an issue of bonds, and thereafter defaulted in the payment of the interest. Under a power in the mortgage, the trustees entered into possession, completed and operated the road for the benefit of the bondholders. An action was brought to compel the trustees to

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build fences and farm crossings; which was defended on the ground that no corporations or persons could be compelled to perform either of these statutory duties, except those mentioned in the statutes. It was held that the trustees being in possession, with power to make reparations and additions, that they had the right, and it was their duty to construct fences and necessary farm crossings; that being in possession of the property and engaged in operating it, that they must carry out the provisions of the statutes as the representatives of the corporation. In this case the defendant, by a covenant in the lease, above quoted, expressly agrees to perform all things in connection with the road which the lessor might be required by law to perform. This provision plainly includes the duties imposed by statute on the lessor, and brings the case within the principle of *Jones v. Seligman*. The position that the defendant is not liable because it is not a corporation of this state, or organized under chapter 140, L. 1850, is not tenable. It having the right to operate its leased lines under the statutes of this state, it must be held to have assumed to discharge the same duties to the public and adjoining owners as are imposed upon such corporations organized and existing under our own statutes.

Before the defendant's road was built quarries had been opened on the farm from which stone used in building and for cement were taken and sold, and when the road was constructed the land was used for agricultural purposes, and portions of it for quarries. The defendant insists that it was error to receive evidence of the extent of the use, or of the value of the property for quarries, or to order a crossing constructed for any uses except agricultural ones. The statute does not limit the right of adjoining owners to crossings solely for agricultural purposes, but they may be ordered to enable owners to remove the natural products of the land, like stone and minerals.

The evidence is sufficient to sustain the finding that a suitable crossing for the use of this property had not been built, and the questions where one should be constructed, its dimen-

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built at different times through a farm. The owner has a right to a crossing over the road first built, but it is urged that in case another is constructed by the side of the first he has no right to compel the latter to build a crossing over it. The statute is not capable of any such narrow construction, its design being to compel such corporations to construct and maintain such crossings over their lines as are necessary to enable owners having land abutting on either or both sides of the road to reach and work their properties.

By chapter 244 of the Laws of 1855, this defendant is authorized, in the prosecution of its business, to make contracts with any corporation in this state, and to sue and be sued in its courts. Under that statute, the defendant leased from the New York, Lackawanna and Western Railway Company, for 499 years, its entire property then owned, or thereafter to be acquired, with all the franchises, immunities, rights, powers and privileges which had been then granted, or which should be thereafter granted, to the lessor. The lease, among other provisions, contains the following: "And the said party of the second part (defendant) shall, during the continuation of this indenture, use and operate the said railroad and do and perform all acts and things which the party of the first part, as owners of the property and franchises hereby demised, would be bound by law to do and perform had this indenture not been made."

It is true that the section above quoted from the act of 1864, which imposes certain duties upon lessees of railroads, does not, in express terms, require them to build and maintain farm crossings. But they are, however, expressly required to build and maintain division fences, with openings having gates or bars therein, at farm crossings. In *Jones v. Seligman* (81 N. Y. 190), a railroad corporation mortgaged its property to trustees to secure the payment of an issue of bonds, and thereafter defaulted in the payment of the interest. Under a power in the mortgage, the trustees entered into possession, completed and operated the road for the benefit of the bondholders. An action was brought to compel the trustees to

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build fences and farm crossings; which was defended on the ground that no corporations or persons could be compelled to perform either of these statutory duties, except those mentioned in the statutes. It was held that the trustees being in possession, with power to make reparations and additions, that they had the right, and it was their duty to construct fences and necessary farm crossings; that being in possession of the property and engaged in operating it, that they must carry out the provisions of the statutes as the representatives of the corporation. In this case the defendant, by a covenant in the lease, above quoted, expressly agrees to perform all things in connection with the road which the lessor might be required by law to perform. This provision plainly includes the duties imposed by statute on the lessor, and brings the case within the principle of *Jones v. Seligman*. The position that the defendant is not liable because it is not a corporation of this state, or organized under chapter 140, L. 1850, is not tenable. It having the right to operate its leased lines under the statutes of this state, it must be held to have assumed to discharge the same duties to the public and adjoining owners as are imposed upon such corporations organized and existing under our own statutes.

Before the defendant's road was built quarries had been opened on the farm from which stone used in building and for cement were taken and sold, and when the road was constructed the land was used for agricultural purposes, and portions of it for quarries. The defendant insists that it was error to receive evidence of the extent of the use, or of the value of the property for quarries, or to order a crossing constructed for any uses except agricultural ones. The statute does not limit the right of adjoining owners to crossings solely for agricultural purposes, but they may be ordered to enable owners to remove the natural products of the land, like stone and minerals.

The evidence is sufficient to sustain the finding that a suitable crossing for the use of this property had not been built, and the questions where one should be constructed, its dimen-

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sions, and whether over or under the tracks, were questions of fact for the trial court; and there being evidence to sustain the finding that the crossing should be located at Hewitt street and built in the manner described in the judgment, the discretion of the trial court, which seems from the evidence to have been fairly exercised, cannot be overruled by the Court of Appeals.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

FREDERICK RECK, Appellant, v. THE PHENIX INSURANCE
COMPANY, Respondent.

Upon trial of an action upon a policy of marine insurance, one question was as to whether the vessel was lost before or after the policy expired. There was evidence authorizing the inference that it was before. The plaintiffs conceded that the question was one of fact, but defendant refused to go to the jury on that question, and each party requested the court to direct a verdict in its favor. The court stated that neither party desired to have the facts submitted to the jury, and upon the inferences he was permitted to draw from the evidence, directed a verdict for plaintiff. *Held*, no error.

The policy contained a warranty that the vessel insured should not be loaded more than the "registered tonnage" with lead, marble, coal or iron on any one passage. *Held*, that the term "registered tonnage" had reference to that specified in the register under which the vessel sailed, and that upon an allegation of a breach of the warranty, the question was as to whether the cargo was of greater weight than that specified in the ship's register.

The vessel was a foreign one. *Held*, that the laws of measurement existing under acts of congress had no application, as the vessel under our law was not qualified to obtain an American register.

The policy also contained a warranty that the vessel would not use certain ports specified, between certain dates. The written application for the policy bore date at a day between the dates specified, and stated that the ship was then at one of the prohibited ports. *Held*, that said warranty was waived; and so, that a breach thereof was not a defense to the action.

The policy was issued to a firm "for account of whom it may concern."

The ship was at the date of the policy owned by R., one of the firm.

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The insurance was effected for the benefit of plaintiff, a creditor of R. and a mortgagee of the ship. Defendant set up as a counter-claim certain notes made or indorsed by the firm. *Held*, that there was no legal basis for the counter-claim.

(Argued October 19, 1891; decided December 1, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department made November 7, 1889, which set aside a verdict in favor of the plaintiff directed by the trial court, and ordered a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Ezek Cowen for appellant. The appeal to the General Term in this case rested only on questions of law, and no disputed question of fact was, or could properly be, considered by that court. (*Provost v. McEncore*, 102 N. Y. 650; *Colligan v. Scott*, 58 id. 671; *Winslow v. Hicks*, 18 id. 558; *Kirtz v. Peck*, 113 id. 222.) The ship was not loaded above the American registry of November, 1862, describing her capacity as 916 $\frac{1}{2}$ tons. (Laws of 1851, chap. 134, § 14.) The defendant was estopped from setting up a breach of the warranty that the vessel should not use ports north of Antwerp, between November first and March first. (*Frost v. S. M. Ins. Co.*, 5 Den. 154; *Couch v. R. G. F. Ins. Co.*, 25 Hun, 469; *Van Schaick v. N. F. Ins. Co.*, 68 N. Y. 434; *Bennett v. N. B. Ins. Co.*, 81 id. 273.) The insurable interest of the plaintiff and his right to recover upon the policy were abundantly proved. Theodore Ruger was the owner of the vessel. The policy was issued to Ruger Brothers for account of whom it may concern. Such a policy insures the real owner. (*P. M. Ins. Co. v. G. W. Ins. Co.*, 65 Barb. 336, 337; *Bidwell v. N. W. Ins. Co.*, 19 N. Y. 182.) Proof that Ruger gave plaintiff a mortgage being received without objection, a motion to strike it out was properly denied. (*P. M. S. S. Co. v. G. W. Ins. Co.*, 65 Barb. 334.) There was no error in the ruling of the court as to the notes from Ruger Brothers, offered as an offset. (*Risley v. P. Bank*, 83 N. Y. 329; *Green v. R. Ins. Co.*, 84 id. 572;

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P. M. S. S. Co. v. G. W. Ins. Co., 65 Barb. 337; *Martin v. Kunzmuller*, 37 N. Y. 396; *Lowell v. Lane*, 33 Barb. 292.)

George A. Black for respondent. There was a breach of the warranty against overloading. (*Hart v. S. M. I. Co.*, L. R. [22 Q. B. Div.] 502; *I. S. S. Co. v. Tinker*, 94 U. S. 243; *Roberts v. Opdyke*, 40 N. Y. 263; *Ins. Co. v. Thuring*, 13 Wall. 672; *Greer v. Poole*, L. R. [5 Q. B. Div.] 273; 16 Hun, 345; Const. U. S. art. 1, § 8; Laws of 1851, chap. 134, §§ 1, 7; *Many v. B. I. Co.*, 9 Paige, 195; *Walls v. Bailey*, 49 N. Y. 464; *Harris v. Tunbridge*, 83 id. 92.) It was not shown that the vessel was lost during the life of the policy, that is, before December 29, 1866, and the facts and circumstances proven did not warrant the trial judge in directing a verdict for plaintiff. (3 Kent's Comm. 410; *Brown v. Nielson*, 1 Caines, 525; *Gordon v. Bowne*, 2 Johns. 150; *Oppenheim v. Wolf*, 3 Sandf. Ch. 571; *Clifford v. T. M. Ins. Co.*, 50 Me. 197.) The warranty "Not to use ports on the Continent of Europe north of Antwerp between November 1st and March 1st," was broken. (*Dow v. Whitten*, 8 Wend. 161; *Higginson v. Dall*, 13 Mass. 99; *DeHohn v. Hartley*, 1 T. R. 343; *Atherton v. Brown*, 14 Mass. 152; Marshall on Ins. 249; *Alexander v. G. F. Ins. Co.*, 66 N. Y. 467; *Pinder v. R. F. Ins. Co.*, 47 id. 114.) If Theodore Ruger was the insured, then the judgment and notes should have been set off as requested. (Code Civ. Pro. § 502; *Shipman v. Lansing*, 25 Hun, 290; *Coffin v. McLean*, 80 N. Y. 562.)

BROWN, J. This action was upon a policy of marine insurance issued by the defendant to Ruger Brothers for account of whom it may concern, and which insured the ship "Elise Ruger" against the perils of the sea for one year from December 29, 1865.

The ship at the date of the policy was owned by Theodore Ruger, and the insurance was effected for the benefit of the plaintiff, a creditor of said Theodore and a mortgagee of the vessel.

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The policy, among other things, contained the following warranties: "Warranted not to load more than her registered tonnage with lead, marble, coal or iron, on any one passage."

Also "not to use ports on the continent of Europe north of Antwerp between 1st of November and 1st of March."

The vessel sailed from New York for Yokohama, Japan, on May 26, 1866. She was loaded with about 901½ gross tons of coal. There was evidence that she was seen in October of that year at a place called Pitts Passage, but she was never seen or heard from subsequent to that date, and plaintiff claimed that she was lost on the voyage with all on board.

The defenses urged at the trial were: (1) That the warranties above quoted had been broken; (2) that the proof did not establish a loss within the life-time of the policy; (3) that there was no evidence of a debt to the plaintiff, and hence no insurable interest in him, and (4) a counter-claim upon certain promissory notes made or indorsed by Ruger Brothers.

At the close of the trial the defendant moved to dismiss the complaint, which was denied. It then moved that a verdict be directed in its favor. It was conceded by the plaintiff that the question whether the vessel was lost before the policy expired was one of fact, but the defendant refused to go to the jury upon that question, and each party thereupon requested the court to direct a verdict in its favor.

The court was apparently of the opinion that the case presented questions of fact, but stated that as neither party desired to have them submitted to the jury, and drawing such inferences from the evidence as he was, under the circumstances, permitted to do, he directed a verdict for the plaintiff.

The question, therefore, presented to us is whether the conclusions of fact which the court made in its decision have support in the evidence.

The General Term sustained the defense resting upon the allegation of a breach of warranty against overloading, and held that the proof showed the registered tonnage of the vessel to be 792.

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It appeared that the vessel was built in the United States, and when first launched had an American register, which stated the tonnage to be 916. Subsequently, however, she was sold to a citizen of Hanover, and received a Hanoverian register, and sailed under the Hanoverian flag. This register was lost with the ship, but what was substantially a copy was produced on the trial from the official records of the port where the register was recorded, from which it appeared that the ship's capacity was 351.97 "commercial lasts."

This latter term was one indicating the vessel's capacity or ability to carry a given weight, and a "last" was taken as the equivalent of six thousand pounds.

The General Term was of the opinion, and in it we concur, that the term "registered tonnage" referred to the vessel's carrying capacity as stated in the ship's papers under which she was sailing at the date of the policy, but that learned court fell into the error of holding that 792 tons was the equivalent of 351.97 commercial lasts.

This conclusion was drawn from a law of the German Empire, which included Hanover, and which provided the rule by which the equivalent of lasts could be ascertained in tons, but that law was not enacted until 1872, long after the loss of the ship and, therefore, was not applicable to the case.

It seems to us that the question arising upon the warranty was whether the cargo of coal taken on at New York was of greater weight than that specified in the ship's register as her carrying capacity.

The evident purpose of the provision was to prevent overloading with heavy merchandise and, therefore, the policy limited her cargo to the official rating of the ship or the stated carrying capacity as appeared from the official register under which she sailed. And it appearing that a commercial last was the equivalent of six thousand pounds, the capacity of the ship to carry the specified merchandise was limited by the policy to 2,111,820 pounds, or about 942 $\frac{2}{3}$ gross tons.

Thus her registered carrying capacity was in excess of her cargo and the warranty was not broken.

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The learned counsel for the respondent refers to the law of measurement existing under the acts of congress by which one hundred cubic feet of space within the ship's hold is taken to be a ton, and has argued that the intent of the policy was to limit the cargo to be carried to one ton in weight for each ton of measurement of the ship, and he proved upon the trial an official measurement of the ship as a foreign vessel, made at New York in May, 1866, by which her tonnage capacity appeared to be 857. But we are of the opinion that our law had no application to the case, as the vessel having been a foreign one and under our law not qualified to obtain an American register, the use of the term "registered tonnage" may fairly be presumed to have had reference to the capacity of the ship as it should appear in the register under which she sailed and which, of course, could not have been ascertained under the law of measurement prevailing in this country.

The warranty not to use ports in Europe north of Antwerp between November first and March first we think was waived.

The written application for the policy bearing date January 23, 1866, stated that the ship was then at Rotterdam. That was a port north of Antwerp, but having insured the vessel while lying at that port, the defendant cannot now be permitted to claim that that fact was in violation of any clause of the policy. The argument presented now to the court, however, is that the vessel was not permitted to leave that port during the prohibited months. But there is no evidence in the case which shows that she did leave Rotterdam prior to March first.

The charter party for the ship's voyage dated May tenth, described the vessel as then lying at New York.

The complaint alleged that she arrived in New York about April fourteenth, and one witness stated that she was at that port for about a month before she sailed on her last voyage.

But there is no evidence of when she left Rotterdam, nor of the usual length of the voyage between that port and New York, and assuming that allegation of the complaint to be correct, the court could not determine as a fact that the voyage could not have been made between the dates named.

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The question whether the vessel was lost within the life-time of the policy was one of fact, and in view of the refusal of the defendant to have it submitted to the jury, the court was permitted to draw the inference fairly arising on the evidence, and we think the conclusion reached has support in the testimony.

The evidence of the debt to the plaintiff was ample and there was no legal basis for the counter-claim of the notes against Ruger Brothers.

We find no error in any of the rulings upon admission of testimony.

The order of the General Term should be reversed and judgment entered upon the verdict, with costs.

All concur.

Order reversed and judgment accordingly.

GEORGE W. MORRISON, Respondent, v. THE BROADWAY AND SEVENTH AVENUE RAILROAD COMPANY, Appellant.

Plaintiff, a man of seventy years, without anything in his hands to impede him, signalled a car which was passing at the usual speed on defendant's road on a crowded street; the brake being applied, the car slowed up but did not entirely stop; plaintiff caught hold of the rail of the rear platform with both hands and as he put his feet on the step the brake was relaxed, the car started with a sudden jerk, his feet were thereby thrown from the step. he was dragged along for a distance and was injured. In an action to recover damages, *held*, that the question of defendant's negligence and of plaintiff's contributory negligence were questions of fact, and so, were properly submitted to the jury; that the fact that the car was moving slowly when plaintiff attempted to get on did not establish contributory negligence as matter of law.

Hayes v. 42d St., etc., R. R. Co. (97 N. Y. 259), distinguished.

(Argued October 19, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 16, 1890, which affirmed a judgment in favor

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of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries received by plaintiff, a man seventy years of age, while attempting to get on board one of defendant's cars in the city of New York.

The facts, so far as material, are stated in the opinion.

Root & Clarke for appellant. There was no negligence on the part of the defendant. (*Hayes v. F. S. S. R. R. Co.*, 97 N. Y. 259.) Nor can the verdict be sustained upon the theory that the defendant's employes were negligent in rescuing the plaintiff, after he had fallen and while he was being dragged. (*Rhing v. B. & S. A. R. R. Co.*, 25 N. Y. S. R. 563.)

Edwin R. Leavitt for respondent. The facts show that plaintiff did not voluntarily assume any risk whatever in attempting to board the car while in motion. (*Breen v. N. Y. C. & H. R. R. R. Co.*, 109 N. Y. 297; *Brassell v. N. Y. C. & H. R. R. R. Co.*, 84 id. 241; *Eppendorf v. B. C., etc., R. R. Co.*, 69 id. 195.) Plaintiff was not guilty of any contributory negligence which would have warranted the court in dismissing the complaint. (*Eppendorf v. B. C., etc., R. R. Co.*, 69 N. Y. 195, 196; *Beach on Cont. Neg.* 296, 301, 302; *Munroe v. T. A. R. Co.*, 18 J. & S. 114; *Bucher v. N. Y. C. & H. R. R. R. Co.*, 98 N. Y. 128; *Morrison v. E. R. Co.*, 56 id. 302; *Filer v. N. Y. C. R. R. Co.*, 49 id. 47; *Van Ostran v. N. Y. C. R. R. Co.*, 35 Hun, 590; *Hunter v. C. & S. V. R. Co.*, 112 N. Y. 376; *Spaulding v. Jarvis*, 32 Hun, 621; *Payne v. T., etc., R. Co.*, 83 N. Y. 572; *Kain v. Smith*, 89 id. 378, 384; *Johnson v. H. R. R. R. Co.*, 20 N. Y. 65; *McDonald v. L. I. R. R. Co.*, 116 id. 546.) The judgment must stand if there was evidence proper for the consideration of the jury, and sufficient in some reasonable view to induce the verdict. (*Breen v. N. Y. C. & H. R. R. R. Co.*, 109 N. Y. 298; *Bevier v. D. & H. C. Co.*, 13 Hun, 254; *Black v. B. C., etc., R. R. Co.*, 108 N. Y. 640; *Munroe v. T. A. R. Co.*, 18 J. & S. 114; *Samson v. R., etc., R. R. Co.*,

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48 Hun, 113; *Butler v. C. F. S., etc., R. R. Co.*, 17 N. Y. S. R. 565; *Holbrook v. U. & C. R. Co.*, 12 N. Y. 236.) It was not error to admit the question as to the probability or improbability of the plaintiff's arm getting well. Evidence of experts as to the future consequences which are reasonably expected to follow the injury is competent. (*Strohm v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 305, 306; *Bateman v. N. Y. C. & H. R. R. R. Co.*, 47 Hun, 429; *Montaugh v. N. Y. C. & H. R. R. R. Co.*, 49 id. 456, 462; *Curtis v. City of Rochester*, 18 N. Y. 534; *Sheehan v. Edgar*, 58 id. 631; *Buell v. N. Y. C. R. R. Co.*, 31 id. 320; *Matteson v. N. Y. C. R. R. Co.*, 35 id. 487, 492; *Johnson v. B. & S. R. R. Co.*, 6 N. Y. Supp. 113; *Feeney v. L. I. R. R. Co.*, 116 N. Y. 376, 382; *McSwyny v. B., etc., R. Co.*, 7 N. Y. Supp. 456.) The refusals to charge were proper. (*Salters v. U., etc., R. R. Co.*, 88 N. Y. 49; *Morrison v. N. Y. C. R. R. Co.*, 63 id. 643; *Newall v. Bartlett*, 114 id. 399; *Burdick v. Freeman*, 120 id. 425.) The denial of the motion to set aside the verdict was not error. The only ground that needs discussion on this point is as to whether the damages were excessive, and nothing in this case warranted granting the motion on that ground. (Sedg. on Dam. 601; *Althor's v. Sharp*, 13 Wkly. Dig. 478; *Kiff v. Youmans*, 20 Hun, 123; *Sloan v. N. Y. C. R. R. Co.*, 1 id. 540; *Deck v. N. Y. C. R. R. Co.*, 8 id. 286; *Jennings v. Van Shaick*, 13 Daly, 7; *Handl v. N. Y. C. R. R. Co.*, Id. 378; *Valentine v. B. & S. A. R. R. Co.*, 16 N. Y. S. R. 602; *Minic v. City of Troy*, 19 Hun, 253; 83 N. Y. 514; *Peck v. N. Y. C. R. R. Co.*, 70 id. 587; *Oldfield v. N. Y. C. R. R. Co.*, 14 id. 310.)

BRADLEY, J. The personal injury to the plaintiff resulted from his attempt to get on the defendant's car. And the questions presented are whether the conclusion was warranted from the evidence that the injury was occasioned by the negligence of the defendant, and that it was not attributable to any negligence on the part of the plaintiff. It appears that he signalled his purpose to take the car, the brake was applied,

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and the motion of the car was slackened although not entirely stopped ; that the plaintiff then proceeded to get aboard and for that purpose he with both hands caught hold of the rail at the rear platform, and as he put one foot or both feet on to the step the brake was relaxed and the car started with a sudden jerk, by which his foot or feet were thrown from the step and he, with his hands holding onto the rail, was dragged about one hundred and twenty-five feet. The questions arise upon exception to the denial of the defendant's motion for dismissal of the complaint on the grounds that the plaintiff was not free from contributory negligence, and that the plaintiff's injury was not caused by negligence of the defendant. The fact that the car was in motion when the plaintiff proceeded to step on it was one for consideration on the question whether he voluntarily assumed the hazard of safety in getting on board of it at the time he attempted to do so. The conclusion was warranted that the speed of the car was then reduced to that given by bringing the horses to a walking gait. The slowness of the motion was aided by the application of the brake. The plaintiff carried nothing to impede his movement in getting on the car. He guarded his attempt by taking hold of the rail to which he held until the car was stopped after dragging him the distance mentioned ; and when he so grasped the rail he planted one or both of his feet on the step of the platform. Assuming as here we must, that such were the facts, he was not necessarily chargeable with contributory negligence ; and that question was properly submitted to the jury. (*Eppendorf v. B. C. & N. R. R. Co.*, 69 N. Y. 195.) The negligence of the defendant was not in the fact that the car failed to come to a full stop. If the motion of it had not slackened sufficiently to enable the plaintiff to safely do so the attempt to board the car was his fault. But as the evidence permitted the finding that it had eased up sufficiently for the purpose, the conclusion might properly follow that the fault was with the defendant in defeating the opportunity of the plaintiff to safely get aboard by suddenly jerking the car into more rapid motion while he had only partially accomplished it. By the application of the

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brake and bringing the car to a slow movement upon the plaintiff's signal, he was induced to proceed as he did to get into it, and he was entitled to a fair opportunity to get firmly on the platform of the car. This was denied him by too soon relaxing the brake and suddenly with a jerk pulling the car into a more rapid motion, resulting in the consequences which followed. The question whether the defendant was chargeable with negligence was one of fact properly submitted to the jury. (*Eppendorf v. B. C. & N. R. R. Co.*, *supra*; *Black v. Brooklyn City R. R. Co.*, 108 N. Y. 640; *Nichols v. Sixth Av. R. R. Co.*, 38 id. 131; *Keating v. N. Y. C. & H. R. R. Co.*, 49 id. 673).

The fact that the plaintiff with accelerating speed was dragged as, and the distance, he was, until the car was stopped to relieve him, was a circumstance tending to prove that the attention due to persons who are properly proceeding to get on a street car may not have been given to the plaintiff in this instance. There is, however, some evidence tending to prove, or which permitted the inference that the embarrassing position of the plaintiff was prolonged by the failure of the conductor to make the driver understand the signal he intended to give him to stop the car.

In view of the facts in *Hayes v. Forty-second Street, etc. R. R. Co.* (97 N. Y. 259), and those which the jury were permitted to find in the present case, that case has not necessarily any essential application to this one. Nor does it in legal effect qualify the doctrine of the *Eppendorf* case, to which it makes no reference. No other question requires consideration.

The judgment should be affirmed. ●

All concur.

Judgment affirmed.

Statement of case.

JOHN I. PRYOR, Respondent. v. HUBBARD A. FOSTER,
Appellant.

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144	712
180 171	
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It seems in order to recover damages for false representations, fraud must be proved and cannot be presumed; the representations must be shown to have been made with a knowledge that they were false and untrue, and for the purpose of deceiving the plaintiff, and that they had that effect.

One who perpetrates a fraud commits a wrong for which he is liable to the defrauded party in at least nominal damages, even though no actual damages are shown.

Where a fraud is perpetrated in procuring the execution of a contract, the party defrauded has an election of remedies; he may, after knowledge of the fraud, rescind and recover back that which he has parted with, or he may continue to perform on his part, and, unless he has waived the fraud, maintain an action for the damages sustained.

If he rescinds, he must do so immediately on discovering the fraud; and if he continues to perform under the contract, he will be considered to have elected to affirm it.

In an action to recover damages for alleged false representations made by defendant on leasing a house to plaintiff as to the relative capacity of, and quantity of coal required to run the furnace therein, plaintiff's evidence tended to establish the false representations, that defendant knew them to be false, and made them with intent to induce plaintiff to enter into the lease. It appeared that plaintiff's term commenced in mid-winter; that he immediately, after taking possession, discovered that the furnace would not heat the house, and had several talks with defendant upon the subject, in which he stated he should hold the latter responsible. He continued in possession and paid the rent as it fell due. *Held*, that plaintiff had the right to continue to occupy the premises and demand the damages suffered through defendant's fraud, which were the difference in the rental value of the premises as they were and as they would have been if as represented; that plaintiff's payment of the rent did not raise the presumption of an intent to waive the fraud or the right to such damages.

People v. Stephens (71 N. Y. 527); *Barr v. N. Y., L. E. & W. R. R. Co.* (125 N. Y. 263), distinguished.

(Argued October 19, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made July 12, 1889, which affirmed a judgment in favor of plaintiff

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entered upon a decision of the Municipal Court of the city of Buffalo.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edmund J. Plumley for appellant. The proofs were wholly wanting in the elements from which fraud is to be inferred. (*Grove v. Wakeman*, 11 Wend. 188; *Schultz v. Hoagland*, 85 N. Y. 467; *Baird v. Mayor, etc.*, 96 id. 593; *Phillips on Ev.* 599; *Macullar v. Rindskopf*, 116 N. Y. 436; *Hammatt v. Emerson*, 27 Me. 308; *Meyer v. Amidon*, 45 N. Y. 169; *Oberlander v. Spiess*, Id. 175; *Duffany v. Ferguson*, 66 id. 482-485; *Jackson v. Badger*, 109 id. 632; *Salisbury v. Howe*, 87 id. 128; *Russell v. Clark*, 7 Cranch. 19; *Lord v. Goddard*, 13 How. [U. S.] 198; *Cooper v. Schlesinger*, 111 U. S. 148; *Macullar v. McKinley*, 99 N. Y. 358; *Brackett v. Griswold*, 112 id. 467.) The representations in question were simply expressive of the defendant's opinion and, upon the proofs as they stood when the motion for a nonsuit was made, admitted of no other interpretation, and for that reason the motion should have been granted. (2 Addison on Torts, 422; *Gordon v. Parmalee*, 2 Allen, 212; *Judwine v. Slade*, 2 Esp. 572; *Caulson v. Whiting*, 14 Abb. [N. C.] 60; *Akin v. Kellogg*, 119 N. Y. 449.) Defendant was guilty of no concealment of any matter which it was his duty to disclose, and was not liable. (*Van Epps v. Harrison*, 5 Hill, 69; *Starr v. Bernard*, Id. 503; *Vandewalker v. Osmer*, 1 T. & C. 50; 65 Barb. 556; *Weidner v. Philips*, 39 Hun, 1; *People's Bank v. Bogart*, 81 N. Y. 101, 109; *Chrysler v. Canaday*, 90 id. 272, 279; *Wood v. Amory*, 105 id. 278; *Tockerson v. Chapin*, 20 J. & S. 16; *Brown v. Burhaus*, 4 Hun, 227; *McDonald v. Flamme*, 13 Abb. [N. C.] 457.) The plaintiff waived any claim to damages by reason of the defendant's representations. (*People v. Stephens*, 71 N. Y. 356; *Knapp v. Roche*, 94 id. 333; Story on Cont. §§ 516, 517; Benj. on Sales, 338; *People's Bank v. Bogart*, 81 N. Y. 109; *Wood*

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v. *Amory*, 105 id. 281, 282; *Cooley on Torts* [2d ed.] 557; *Reilly v. Mayor, etc.*, 111 N. Y. 478; *Mayor, etc., v. Brady*, 115 id. 611; *Slaughter v. Gerson*, 13 Wall. 379; *Studer v. Bliestein*, 115 N. Y. 324; *Garlock v. Markham*, 31 N. Y. S. R. 263; *S. D. Co. v. Silva*, 125 U. S. 678; *Reed v. Randall*, 29 N. Y. 358; *Neaffie v. Hart*, 4 Lans. 4; *Vernol v. Vernol*, 63 N. Y. 47; *Baird v. Mayor, etc.*, 96 id. 598; *Acer v. Hotchkiss*, 97 id. 406; *Norton v. Dreyfus*, 106 id. 94; *C. I. Co. v. Pope*, 108 id. 236; *Brown v. Foster*, Id. 387; *Lack v. Wykoff*, 11 N. Y. S. R. 678; *Bowen v. Mandeville*, 95 N. Y. 237; *Boreel v. Lawton*, 90 id. 293; *Rennett v. Bates*, 94 id. 273; *Cox v. Mayor*, 103 id. 527; *Sexton v. Pepper*, 28 Hun, 31; *Phelps v. Mayor*, 112 N. Y. 216; *Barr v. N. Y., L. E. & W. R. R. Co.*, 125 id. 263.) The trial court erred in permitting the hypothetical question put to the witness Newbrook, and other witnesses, to be answered, against the objection of the defendant. (*Morgan v. Skidmore*, 3 Abb. [N. C.] 106; *Tockerson v. Chapin*, 20 J. & S. 16.) The proofs failed to ascertain and fix the amount of the damage sustained by the plaintiff, or to entitle him to a judgment for any amount of damage. (*Tockerson v. Chapin*, 20 J. & S. 16; *Salisbury v. Howe*, 87 N. Y. 135.) The proofs fully authorize a finding that defendant's opinion was amply justified, and hence there was no fraud. (*Bennett v. Buchan*, 76 N. Y. 386; *Wood v. Amory*, 105 id. 281; *Salisbury v. Howe*, 87 id. 135; *Cullen v. Hernz*, 13 N. Y. S. R. 336; *Stitt v. Little*, 63 N. Y. 431, 432; *Hoyt v. Godfrey*, 88 id. 669; *Duffany v. Ferguson*, 66 id. 485; *Akin v. Kellogg*, 119 id. 449.) Plaintiff cannot complain of the size, construction, kind or mode of operation of the heating apparatus; and the proof does not show that it was broken down, worn out, or out of order in any respect. (*Dambmann v. Schulting*, 75 N. Y. 61, 62; *People's Bank v. Bogart*, 81 id. 108, 109; *Wood v. Amory*, 105 id. 281; *Simons v. Seward*, 7 N. Y. S. R. 57, 58; *Edwards v. N. Y. & H. R. R. Co.*, 98 N. Y. 247.)

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Tracy C. Becker for respondent. The question most strongly urged by appellant is that plaintiff by remaining on the premises after he had learned of the defect in the heating apparatus, and the falsity of the representations, waived his right to recover any damages. This point is not well taken. (*Whitney v. Allaire*, 1 N. Y. 308, 309; *Smith v. Countryman*, 30 id. 670-675; *Miller v. Barber*, 66 id. 558; *Krum v. Beach*, 96 id. 398; *Strong v. Strong*, 102 id. 69.) The measure of damages adopted by the court below was the one suggested by the opinion at General Term on the first appeal, the difference in the rental value of a house with a furnace capable of heating it comfortably as represented, and such a house heated as the one in question here. This was the correct rule. (*Cook v. Soule*, 56 N. Y. 420.) The judgment below should be affirmed not only with costs, but also with ten per cent on the recovery below, which should be awarded as damages for the delay caused by this appeal. (Code Civ. Pro. § 3251; *Jackson v. City of Rochester*, 124 N. Y. 624.)

HAIGHT, J. On the 27th day of January, 1887, the defendant leased to the plaintiff a house on the corner of Allen and Wadsworth streets in the city of Buffalo for the term of fifteen months and five days.

This action was brought to recover damages for alleged false representations made by the defendant to the plaintiff to the effect that the furnace in the house was a good one; that it heated the house nicely and comfortably with from eight to ten tons of coal per year; that in a moderate winter it would heat the house thoroughly with eight tons and in a cold winter with ten tons.

Fraud must be proved and not presumed. The representations alleged must be made with a knowledge that they are false and untrue and for the purpose of deceiving the plaintiff. That these facts must be established to the satisfaction of the jury no one will question.

Upon the trial evidence was given on behalf of the plaintiff tending to show that the representations were made by the

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defendant; that they were false and known by him so to be and were made with the intent to induce the plaintiff to enter into the lease. Whilst this evidence was controverted, it became a question of fact for the determination of the trial court, and inasmuch as the judgment of that court has been affirmed by the General Term of the Superior Court that determination must here be considered final and conclusive. There being evidence to sustain the finding, the defendant cannot here avail himself of his exception taken upon the refusal of his motion for a nonsuit.

We, therefore, pass to the consideration of the main question raised for review, and that is whether or not the plaintiff's right to maintain this action has been waived by his subsequent conduct.

The rule is that where a fraud is perpetrated in procuring the execution of a contract the party defrauded has an election of remedies. He may after knowledge of the fraud rescind the contract and recover back that which he has parted with, or he may continue to perform on his part and maintain an action for such damages as he has sustained by reason of the fraud. (*Whitney v. Allaire*, 1 Hill, 484; *S. C.*, 4 Denio, 554; affirmed, 1 N. Y. 305; *Miller v. Barber*, 66 id. 558.)

If he rescind, he must do so immediately upon the discovery of the fraud, and if he continue the use and occupation of the property received under the contract, he will be deemed to have elected to affirm it. (*Strong v. Strong*, 102 N. Y. 69; *Schiffer v. Dietz*, 83 id. 300.)

The plaintiff in this case did not rescind. He continued in the use and occupation of the premises during the entire term for which they were leased and paid the rent thereon from month to month as it became due and payable.

He may, however, have his action for damages, unless he has waived the same.

In Bigelow on Fraud, 184, it is said that, "If a party with knowledge that a fraud has been perpetrated upon him in a particular transaction, confirmed the transaction by making new agreements or engagements respecting it or by retaining

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and using the subject of it after knowledge, or otherwise recognize it as binding, he thereby waives the right to treat it as invalid and abandon his right to rescind if it be a case of contract, or to redress if it be a tort not attended with a contract with the wrong-doer. If the fraud result in a contract, performance of the same after discovering that it was fraudulently obtained by the opposite party, does not preclude a person from suing for damages on account of the fraud. The injured party may retain the benefits of the contract, confirm its validity, and still recover damages for the fraud by which he was induced to make it; or he may recoup any damages which he has sustained if the opposite party sue him for money due on the contract, or other failure to perform it."

* * * And again, "There must be something equivalent to a ratification of the contract after discovery of the fraud; and this may be either by acts of express recognition of its binding force or by allowing the other party to proceed upon it and change his position, or by the intervention of the rights and interests of third innocent persons. But such facts as these merely preclude the injured party from repudiating the contract. He may still bring an action for the damage sustained by being drawn into the contract, even though the contract has passed into judgment."

In Cooley on Torts, 505, it is said that "Fraud may be waived by an express affirmance of the contract. Where an affirmance is relied upon, it should appear that the party having a right to complain of the fraud freely and with a full knowledge of his rights in some form clearly manifested his intention to abide by the contract and waive any remedy he might have had for the deception."

And in *St. John v. Hendrickson* (81 Ind. 350-352), it is said that "There may be waiver of a right to recover damages for the loss resulting from false and fraudulent representations by an express affirmance. It is essential to such a waiver that the party should possess full knowledge of the fraud practiced upon him; that he should intend to confirm the contract and abandon all right to recover for the loss resulting from the

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fraud." * * * And again the court says, "We fully recognize and approve the rule that a party may retain what he received and stand to his bargain and recover for the loss caused him by the fraud. * * * We neither hold nor mean to hold that affirmance by retention of the thing bargained for cuts off an action for damages. We do hold that where a party with full knowledge of all the material facts, does an act which indicates his intention to stand to the contract and waive all right of action for the fraud, he cannot maintain an action for the original wrong practiced upon him. Where the affirmance of the contract is equivalent to a ratification, all right of action is gone. It is only equivalent to a ratification when made with full knowledge of the fraud and of all material facts and with the intention of abiding by the contract and waiving all right to recover for the deception."

It will thus be seen that the question of waiver is largely one of intent. It appears from the testimony of the plaintiff that he moved into the house on the twentieth of February; that immediately thereafter he discovered that the furnace would not heat the house and that he had several talks with the defendant in reference thereto; that on one occasion the defendant came to the house and asked the plaintiff if he had turned the stop-cocks and said: "If you want heat on one side of the house turn this; if the other, turn this;" that the plaintiff then told him that it was impossible to heat the house; that he had never seen a day in cold weather when he could sit comfortably in any room unless all the heat was thrown into that room; that on another occasion he had a conversation with the defendant at the store on or about the second day of May; that he then said to the defendant that it was impossible to heat the house with the furnace; that he must fix it or he would hold him responsible. These conversations occurring from time to time shortly after the discovery of the fact that the furnace would not heat the house, accompanied with the plaintiff's statement that he should hold the defendant responsible, does not indicate an intent on his part to waive his right to recover damages. The question is, therefore, narrowed to the determina-

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tion as to whether the payment of rent from month to month raises the presumption of an intent to waive the fraud. It is not apparrent that the payment of the rent changed the position of the defendant. The lease between the parties had been executed. If the plaintiff had been induced to enter into it through the fraud of the defendant he was entitled to maintain his action for the damages he had sustained immediately upon the discovery of the fraud. The liability of the defendant was neither increased nor diminished by such payment. The plaintiff's measure of damages was the difference in the rental value of the premises as they were and as they would have been had they been as represented. The plaintiff had the right to make as good a bargain as he could, and was entitled to the full benefits thereof. He was, therefore, entitled to full indemnity for the damages that he sustained. (*Krumm v. Beach*, 96 N. Y. 398-407.)

His damages did not arise solely in consequence of the payments of rent reserved by the lease as is contended, for when a party to a contract perpetrates a fraud he commits a wrong for which he is liable to the defrauded party in at least nominal damages, even though no actual damages be shown. (*Northrop v. Hill*, 57 N. Y. 351-354.)

In the case of *Whitney v. Allaire* (*supra*), the action was for rent under a lease. The defendant sought to offset the amount which he had been compelled to pay a third party for an adjoining lot which the plaintiff had falsely and fraudulently represented to be his and included in the lease. It was held that the defendant was entitled to a deduction by reason of the fraud of the sum which he had been so compelled to pay.

In the case of *Cook v. Soule* (56 N. Y. 420), it was held that in an action to recover rent, the lessee had a right to set up as a counter-claim damages arising from the breach of an agreement in the lease on the part of the lessor to keep the premises in repair; that the fact that the lessee had paid the rent, except for the last quarter, does not deprive him of the right to counter-claim his damages for the entire year, and if in

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excess of the rent, he is entitled to a verdict for such excess. (See also *Dennison v. Grove*, 52 N. J. Law, 144.)

Whilst the plaintiff might have offset his damages in an action for rent reserved, we do not think he was bound to refuse payment thereof and then wait for an action to be brought against him therefor. Being a tenant, he might be proceeded against in summary proceedings for the non-payment of rent. In such proceedings his defense of fraud would not be available. Whether he could interfere through equity and restrain the proceedings, it is not necessary to now consider.

We do not regard the case of *People v. Stephens* (71 N. Y. 527), or that of *Barr v. N. Y., L. E. & W. R. R. Co.* (125 id. 263), to be in conflict with the views above expressed.

In the former case, the action was brought to recover damages alleged to have been sustained in consequence of a fraudulent and unlawful combination and conspiracy between defendants to prevent competition, and to deceive the contracting board in letting repair contracts for certain sections of the state canals at excessive prices. The action was brought by the attorney-general to recover moneys paid by the state under such contracts, in excess of the fair value of the work performed and materials furnished. Subsequently an act was passed (Laws of 1870, chapter 55) by which the canal board was authorized, upon the recommendation of the canal commissioners whenever they should deem it to the interest of the state to cancel and annul any contract or contracts for the repairs of the canals theretofore made, by a resolution to be entered on the minutes of the board, and that every contractor whose contract should be canceled and annulled by the board should be entitled to receive the money deposited as security for the performance of his contract, with the accumulated interest thereon, together with the money earned on such contract up to the time of the annulling thereof, and a fair compensation for the tools, materials and implements necessarily procured for the purpose of performing the contract. The canal board did not see fit to cancel the contract of the

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defendants in that action, but required them to perform it, and at the end of each month voluntarily paid the amount earned under the contract.

It was held that this act having been passed with full knowledge on the part of the legislature of the means by which the contract had been obtained, that it must be assumed that the legislature did not deem it in the interest of the state to avail itself of the right to claim damages for the fraud, nor to refuse payment for the work already done.

It is true that ALLEN, J., in delivering the opinion of the court, says that "the parting with the consideration constitutes the legal damage, and that being done with full knowledge of the cheat, fraud or deception cannot be alleged * * *." That "the state agents, acting within the scope of their authority, with full knowledge of the acts and combinations charged, and every fact affecting the validity of the contract, and with full knowledge of the character and value of the services and materials rendered and furnished, required of the defendants a performance of the contract, and at the end of each month paid the stipulated compensation without protest or objection, and without coercion or duress." He further states: "It follows that having the power and right to repudiate and refuse to perform the contract after the commencement of performance, and without waiving liability for damages if the fraud existed as alleged, and continuance of the contract with knowledge of the fraud and under circumstances entitling the contractor to the prices stipulated by the contract, and voluntarily paying the stipulated compensation was a waiver of the fraud."

But it will be observed that in that case the contract, unlike the one under consideration in this case, was executory and materially different. The action was to recover back money in excess of the true value of the work performed, which had been voluntarily paid by the state with full knowledge of the fraudulent conspiracy. No question was made but that the contractors had performed their work in accordance with the contract. The only damages, therefore, which the state

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could suffer was because of the payment of a greater sum than the work was reasonably or fairly worth. The state, as we have seen, had the right to rescind the contract, and had it done so, or had it refused to pay for the services performed, it would have suffered no damage. It was, therefore, held that the payments were voluntary, and that the plaintiff could not recover.

But in this case a very different question is presented. As we have shown, a different rule prevails as to the measure of damages. The plaintiff leased the premises in midwinter and moved into the same with his family. He could not then be compelled to rescind the contract or be deemed to have waived it; for, as we have shown, he had an election of remedies. It might not have been convenient for him at that season of the year to find another house into which he could move. He had the right to continue to occupy the house under his executed contract and demand the damages that he had suffered by reason of the fraud; and it does not appear to us that under the circumstances of this case that his payment of the rent, thereby avoiding the annoyance of summary proceedings, should be construed as a waiver of his right to such damages.

In *Barr v. N. Y., L. E. & W. R. R. Co.* (*supra*), the case appears to have been disposed of upon the ground of ratification, and the question of waiver by reason of rent paid does not appear to have been considered.

We do not deem a discussion necessary as to the other points raised.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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CHANCEY STEVENS, Respondent, v. E. H. OGDEN et al.,
 Impleaded, etc., Appellants.

Under the Mechanics' Lien Law of 1885 (Chap. 342, Laws of 1885), the filing of the prescribed notice originates the lien, and until this is done the laborer or material man has no preferential right to be paid out of the sum due the contractor from the owner of the building. If, before notice is filed, the contractor assigns to a creditor in payment of his debt, the whole or any portion of the moneys due or to become due to him on his contract, the assignor is entitled to the same in preference to the lienor.

The court may not extend purely statutory rights, such as are given by said act, beyond the terms of the statute creating them.

An order drawn by the contractor in favor of a creditor, by its terms payable out of a sum due or to become due from the owner under his contract, when such order is given and accepted in payment of the debt, operates as an assignment *pro tanto* of that fund.

Stevens v. Reynolds (54 Hun, 419), reversed.

(Argued October 20, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1889, which modified, and affirmed as modified, a judgment in favor of the appellants entered upon a decision of the court on trial at Special Term.

Between September 21, 1886, and December 22, 1886, Alexander Anderson furnished building materials and made repairs at No. 115½ Waverly place, New York, for which he was entitled to receive January 26, 1887, \$1,545.48, pursuant to a contract with Bridget M. Reynolds, the owner in fee of the property. While the work was in progress the plaintiff sold and delivered to Anderson lumber used in the reparation of the building of the value and at the agreed price of \$1,097.93, no part of which having been paid, he, on the 15th of February, 1887, duly filed a mechanics' lien pursuant to chapter 342 of the Laws of 1885, the General Mechanics' Lien Law of this state. Between October 7 and November 5, 1886, E. H. Ogden & Co. sold and delivered to Anderson lumber of the value and of the agreed price of \$909.94, a part of which of

130	182
136	620

130	182
143	150

130	182
144	522

130	182
157	327

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the value of \$400 was used in repairing the building. No part of said \$909.94 has been paid. On the 15th of November, 1886, Anderson executed and delivered to E. H. Ogden & Co. an order on Bridget M. Reynolds, of which the following is a copy :

“ Please pay to the order of E. H. Ogden & Co., nine hundred and nine $\frac{24}{100}$ dollars and charge to account of my contract with you for the carpenter work at 115 $\frac{1}{2}$ Waverly place, it being for lumber materials used in construction of same, the amount to be paid of the last payment of \$1,900.” This order was given and accepted as payment for said lumber, and on the day of its date it was duly presented to Mrs. Reynolds, but she did not accept it in writing nor promise to pay the amount represented by it.

November 24, 1886, Anderson by a written order directed Mrs. Reynolds to pay Eben Peek \$113.76 out of the sum to become due January 26, 1887, for the work performed, which was presented to her November twenty-seventh, and she then agreed to pay the amount represented by it. August 1, 1887, this action was begun to foreclose the lien filed by the plaintiff. The Special Term held that the orders drawn in favor of E. H. Ogden & Co. and Peek were valid assignments of portions of the fund (\$1,545.48) due January 26, 1887, and that they were entitled to be first paid out of it, and that the plaintiff was only entitled to the remainder. A judgment was entered in accordance with this decision, and the plaintiff appealed to the General Term from that part of the judgment which adjudged the claim of E. H. Ogden & Co. to be prior to his, but did not appeal from the part adjudging the claim of Peek to be prior to his. The General Term modified the judgment of the Special Term by deducting \$504.94 from the claim of E. H. Ogden & Co., adjudged that they were entitled to \$400, the value of the lumber sold by them which was used on the building, with interest thereon from November 15, 1886, gave the claim of the firm priority over the claim of the plaintiff to that extent and awarded to him the remainder, without costs to either party.

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Charles A. Decker for appellants. The order given by Anderson to Ogden and Bigelow was an equitable assignment *pro tanto* of the last payment due Anderson from Reynolds and was entitled to precedence of payment over the mechanic's lien. (*Brill v. Tuttle*, 81 N. Y. 454; *Lauer v. Dunn*, 115 id. 409; *Conselyea v. Blanchard*, 103 id. 233.) There is no prohibition by the act of 1885, against the payment of the whole of the assignment of Ogden & Co. before the satisfaction of the plaintiff's lien. (Laws of 1885, chap. 342, §§ 1, 2; *Lauer v. Dunn*, 115 N. Y. 405; *Munger v. Curtis*, 42 Hun, 465.) The declaration in the act of 1885, that it is "a remedial statute and is to be construed liberally," should not be held to apply solely to the lienor or for his exclusive benefit where he abuses the privileges it gives him. (*Mushlitt v. Silverman*, 50 N. Y. 360; *Benton v. Wickwire*, 54 id. 226; *Ayers v. Revere*, 1 Dutch. [N. J.] 474; Phillips on Mechanics' Liens, §§ 30, 31.) The plaintiff was guilty of *laches* in not filing his lien till long after the last payment under the contract became due. Nothing in the act of 1885 can excuse this or restore or extend his rights. The lien, therefore, attached only to what was unpaid at the time it was filed. (*McKinglor v. Washington*, 8 W. Va. 666; *Post v. Campbell*, 83 N. Y. 285; *Crane v. Genin*, 60 id. 127; *Gibson v. Lewane*, 94 N. Y. 187; Phillips on Mechanics' Lien, § 93; *Doughty v. Devlin*, 1 E. D. Smith, 635; *Allen v. Carman*, Id. 692; *Payne v. Wilson*, 74 N. Y. 355; *Heckman v. Pinkney*, 81 id. 211; *Otis v. Haley*, 1 Daly, 338.) The plaintiff, by his procrastination, has excluded himself from the benefits of the act. (*Lumbard v. S., etc., R. R. Co.*, 55 N. Y. 491.)

Charles H. Machin for respondent. Ogden & Co. were entitled to receive out of the fund, due under the contract in the contractor's hands, no more than the value of the material furnished by them for the building. (Laws of 1885, chap. 342, § 3.) Appellants' claim has no equitable superiority over that of respondents. (*Payne v. Wilson*, 74 N. Y. 355; Laws of 1885, chap. 342, § 5.) The claim that plaintiff lost any

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rights by not sooner filing his lien is without foundation. The lien was filed within the statutory time, and the assignment was made and delivered three months before the lien was filed. (*People ex rel. v. Comptroller, etc.*, 77 N. Y. 45.) The act under which the lien was filed is a remedial statute and is to be construed liberally to secure the beneficial interests and purposes thereof. (*Post v. Campbell*, 73 N. Y. 270.)

FOLLETT, Ch. J. The order drawn by the contractor on the owner in favor of E. H. Ogden & Co. for \$909.94, being, by its terms, payable out of a particular fund specified in the order, operated as an assignment, *pro tanto*, of that fund. (*Brill v. Tuttle*, 81 N. Y. 454; *Conselyea v. Blanchard*, 103 id. 222; *Lauer v. Dunn*, 115 id. 405.)

In *McCorkle v. Herrman* (22 N. Y. St. Rep. 519; rev. 117 N. Y. 297), several persons had performed labor and furnished materials for a building erected by a contractor for the owner. After the work had been done and the materials supplied, but before any lien was filed, a judgment creditor of the contractor began supplementary proceedings to collect his judgment which did not arise out of, and had no connection with, the building contract, and procured the appointment of a receiver. Subsequently the laborers and material men duly filed their liens, and the question arose whether they or the receiver had the prior right to the sum due from the owner to the contractor. It was held at the General Term that the lienors had the prior right. In discussing this question, the court said: "The statute gives a creditor a lien against a particular fund upon his doing certain things, and that lien is superior to the claim of any other creditor who has not taken the steps designated by the statutes to secure a lien. The plaintiff, by his appointment as receiver, undoubtedly became vested with all the right, title and interest of his judgment debtor in and to this fund as of the time when the preliminary order was served. But he gets no greater right than he would have had if his judgment debtor had assigned the same to him on that day, and he cannot enforce any other or greater rights than his

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judgment debtor could enforce. His creditors, by the permission of the statute, have been enabled to assert a claim upon this debt due to the judgment debtor, and, by reason of the statute, having taken those steps, they have a superior claim upon this debt due to him, and by the transfer of this debt to another person, whether by operation of law or by a voluntary assignment, the plaintiff's debtor could not deprive the creditors of the rights which the law conferred upon them."

The Court of Appeals reversed the judgment, and in discussing the question said: "The real question presented by the demurrer relates to the priority of lien between a judgment creditor of a contractor, who has duly commenced supplementary proceedings on his judgment, terminating in the appointment of a receiver, and laborers and material men who, subsequent to the commencement of the supplementary proceedings, and within the time allowed by law, filed notices of lien to reach the debt owing the contractor, under a contract with the owner of a building for its construction. The section of the Lien Law (Chap. 342 of the Laws of 1885), which governs the right of the lienors in this case, prescribes that upon 'filing the notice of lien,' a lien shall be acquired, etc. The filing of the notice originates the lien. Anterior to this act, the laborer or material man has no preferential right to be paid for his labor or material out of the sum which is due from the owner of the building to the contractor, but stands in the same position as other creditors. He may subject the debt to a lien in his favor on filing the notice and taking the proceeding prescribed by the act. But if, before this has been done, other creditors, pursuing the usual remedies for the collection of debts, have acquired a legal or equitable right to have the debt applied in satisfaction of their claims, the right is not overreached by liens subsequently filed under the act, unless priority is given by the provisions of the act itself." * * *

"Which of the claimants have the prior right? We think the plaintiff as receiver has the superior claim. He stands as the assignee of the claim of the contractor against the defendant, by a title which ante-dates the filing of the notices of

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lien. When the liens were filed there was a debt owing by the defendant. If the proceedings instituted by the creditor, whom the plaintiff represents, had been abandoned, the liens would have had priority. But not having been abandoned, and the equitable lien existing when the liens were filed having been converted into a legal title as of a time anterior to the filing of the liens, the right to the debt, as between the plaintiff and the lienors, vested in the former. The plaintiff, we think, stands in as good a position at least as if prior to the filing of the liens the contractor had, in good faith, assigned his claim against the defendant to the creditor in the supplementary proceedings, as security for his debt. The assignee, under such an assignment, according to the general current of authorities, would take precedence over lienors under liens subsequently filed."

The case cited, like the one at bar, arose under chapter 342, L. 1885, and is decisive of the question presented.

There is no provision in the statute forbidding a contractor to pay his creditors out of the money due or to become due him from the owner to the exclusion of laborers and material men who have not filed liens. This may be an omission, but if so, it can only be supplied by the legislature, for the courts cannot extend these purely statutory rights beyond the terms of the statute by which they are created.

The judgment of the General Term should be reversed, and the judgment entered on the decision of the Special Term affirmed, with costs.

All concur.

Judgment accordingly.

Statement of case.

ANN KEANE, Respondent, v. THE VILLAGE OF WATERFORD,
Appellant.

In an action to recover damages for injuries received by falling on a sidewalk in one of defendant's streets, it appeared that about sixteen days before the accident there had been a heavy fall of snow and another about four days previous. Plaintiff claimed that her fall was caused by a ridge of snow and ice which extended along the center of the walk. Plaintiff's evidence was to the effect that the ridge was five or six inches high; that it was formed of snow, part of which fell during the first and part during the second storm, which was packed down and glazed with ice; that it was uneven and very slippery, and had been there about a week before plaintiff fell. The jury rendered a verdict for plaintiff. *Held*, no error; that the evidence was sufficient to charge defendant with negligence.

Shortly after her fall, plaintiff was found to be suffering from a certain disease, which one of the physicians called as a witness by defendant testified that he had never known to be occasioned by a fall. Other physicians who were called by plaintiff testified that a fall or an attempt to save one's self from a fall might produce the disease. The court submitted to the jury the question whether the disease was occasioned by her fall. *Held*, no error.

(Argued October 21, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 26, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

N. C. Moak and *Thomas O'Connor* for appellant. The court correctly charged that if the alleged ridge was caused by drippings from the roof defendant was not liable. (*Tobey v. Hudson*, 49 Hun, 319; *Kaveney v. Troy*, 108 N. Y. 576, 577.) The trial court and the General Term were bound to decide the case according to the undisputed evidence, and a failure to do so was an error of law, for which the judgments below should be reversed. (*Plyer v. German*, 121 N. Y. 692;

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Lomer v. Meeker, 25 id. 361; *Kelly v. Burroughs*, 102 id. 93, 95, 96; *Watson v. Campbell*, 38 id. 153, 155-157; *Potter v. Chadsey*, 16 Abb. Pr. 146, 147, 150; *Huntington v. Conkey*, 33 Barb. 224, 225; *Millerd v. Thorn*, 56 N. Y. 402, 405; *In re Huss*, 37 N. Y. S. R. 789, 790, 791; Code Civ. Pro. § 944; *Evanston v. Gunn*, 99 U. S. 660, 666, 667.) The snow of January nineteenth, twenty-first and twenty-second, the latter covering the deposit of the nineteenth not being shown to be the real cause of the injury, defendant was not liable on account thereof. (*Taylor v. City of Yonkers*, 105 N. Y. 202; *McNally v. City of Cohoes*, 39 N. Y. S. R. 580; *Harrington v. City of Buffalo*, 121 N. Y. 147; *Hunt v. Mayor, etc.*, 109 id. 134; *Requa v. City of Rochester*, 45 id. 136; *Kinney v. City of Troy*, 108 id. 567; *Blakely v. City of Troy*, 18 Hun, 170; *Foley v. City of Troy*, 45 id. 398.) There was not sufficient evidence to justify the court in allowing a jury to find plaintiff's alleged injury or rectocele was caused by her fall. (*Strohm v. E. R. Co.*, 96 N. Y. 305; *Tozer v. N. Y. C. & H. R. R. Co.*, 105 id. 617.) The court erred in refusing to charge the proposition "that if the jury are unable to determine whether this ridge was caused by drippings from the eaves, or by snow which has been allowed to accumulate on the walk, plaintiff cannot recover." (*Wiwrowski v. L. S. R. R. Co.*, 124 N. Y. 420, 425; *Riordan v. Ocean Steamship Co.*, Id. 655, 658, 659; *Hayes v. F. S. St. R. R. Co.*, 97 id. 259, 262; *Taylor v. City of Yonkers*, 105 id. 203, 209, 210; *Searles v. M. R. Co.*, 101 id. 661, 662; *Dobbins v. Brown*, 119 id. 188, 193-195; *Baulec v. N. Y. & H. R. R. Co.*, 59 id. 357; *Conlin v. Rogers*, 39 N. Y. S. R. 51, 52-54; *Curtis v. Butts*, 4 Trans. App. 404, 406, 407; *Ellis v. Great Western*, L. R. [9 C. P.] 557; 10 Eng. Rep. 299; *Harris v. Sterling*, L. R. [9 C. L.] 202, 203; *Priest v. Nichols*, 116 Mass. 501; *Dearborn v. Union So.*, 58 Me. 273, 274.)

J. F. Crawford for respondent. The negligence of defendant was clearly established. (*Todd v. City of Troy*, 61 N. Y.

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506; *Turner v. City of Newburgh*, 109 id. 301; *Bishop v. Village of Goshen*, 120 id. 337; *Masters v. City of Troy*, 3 N. Y. Supp. 450; *Ney v. City of Troy*, Id. 679; *Provost v. Mayor, etc.*, Id. 531; *Jones v. City of Troy*, 4 id. 792; *Tobey v. City of Hudson*, 49 Hun, 318.) Assuming that the ridge was partially or wholly formed from snow falling on the nineteenth of January, that being four full days before the accident, the jury had the right to infer therefrom constructive notice to defendant's officers of its existence, and to find defendant negligent for not having removed it before the accident. (*Kunz v. City of Troy*, 104 N. Y. 344.) The defense, that this ridge was formed or partly formed by drippings from the roof of the piazza, was not available to defendant. (*Urquhart v. City of Ogdensburg*, 97 N. Y. 283; *Driggs v. Phillips*, 108 id. 77; *Hume v. Mayor, etc.*, 74 id. 264.) Irrespective of the question whether this piazza was or was not of itself a nuisance, if the drip from it, falling at any time previous to the week of the accident, actually produced the result complained of, the defendant is just as responsible for it (in not having sooner removed it), as if it was formed wholly of snow directly from the clouds. (*Wenzlick v. McCotter*, 87 N. Y. 122; *Todd v. City of Troy*, 61 id. 506; *Gillrie v. City of Lockport*, 122 id. 403.) If this ridge was, as defendant claims, formed from drippings from this piazza roof, the village officers, from the long existence of this structure, were chargeable not only with constructive notice of its existence there, but with knowledge of the natural consequences of maintaining such a structure in such a position. (*Corbett v. City of Troy*, 6 N. Y. Supp. 381; *Clark v. Donaldson*, 49 How. Pr. 63.) It is the duty of the appellant, if he desires to raise any question here, to have so made his case as to show plainly that an erroneous ruling was made adversely to him, and not to have left that fact to appear by mere inference or conjecture. (*Tousey v. Roberts*, 114 N. Y. 312; *Jewell v. Van Steenburgh*, 58 id. 85; *Pritchard v. Hirt*, 39 Hun, 378.) Irrespective of any question of possession of funds, or means to raise them, defendant, as a municipal cor-

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poration, is liable for injuries occurring through the neglect of its officers to keep its streets in repair. (*Conrad v. Trustees of the Village of Ithaca*, 16 N. Y. 158; *Getty v. Town of Hamlin*, 8 N. Y. Supp. 190; *Stone v. Town of Poland*, 11 id. 498; *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459; *Weed v. Village of Ballston*, 76 id. 329; *Hines v. City of Lockport*, 50 id. 236.)

HAIGHT, J. This action was brought to recover damages for a personal injury.

On the 23d day of January, 1886, the plaintiff, whilst walking with her daughter-in-law upon the sidewalk on Broad street, in the village of Waterford, slipped and fell, receiving the injuries for which the jury has awarded damages.

The accident occurred nearly in front of the bar-room door of the Worthington Hotel, at about seven o'clock in the evening and after it had become dark. There is some conflict as to the condition of the walk, but all agree that it was slippery.

It is claimed on behalf of the plaintiff that there was a ridge of snow and ice extending lengthwise of the walk, which was four or five inches thick, and that it sloped either way from the top of the ridge; that it was this ridge that caused her to slip and fall. Whilst on the part of the defendant it was claimed that the ridge was composed of ice which was formed from water dripping from the roof of the piazza in front of the hotel. Considerable evidence was given in support of this contention. The trial court charged the jury that if the ridge was of ice formed from the drip from the roof of the piazza, the defendant was not liable. Of this charge the appellant does not complain. It is claimed to be in accordance with the rule laid down in the case of *Kaveny v. City of Troy* (108 N. Y. 571). Whether it is or not, we do not now deem it necessary to consider, for the jury found a verdict for the plaintiff, and must, therefore, be deemed to have found that the ridge was not so formed, and whilst we might have reached a different conclusion had we been called upon to determine the fact in the first instance, we are of the opinion that there is evidence

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which supports the verdict in this regard. It appears that in the early part of the month, between the fifth and eighth, there was quite a heavy fall of snow; that again, on the nineteenth of the month, there was a fall of nearly eight inches. The witness Thomas Cramer testified that the ridge was five or six inches high and was formed by snow; that it was uneven and very slippery; that it had been there about a week before she fell; that it was formed of snow packed down and glazed over with rain; that it had never been touched; that it was formed in part from the snow that fell during the last storm, and in part from that which fell during the first storm.

This evidence is in accordance with the verdict, and renders unavailing the exceptions taken to the refusal of the court to nonsuit.

It is also claimed that the court erred in submitting to the jury the question as to whether the rectocele from which the plaintiff was found to be suffering was occasioned by her fall, but we think the question was one for the jury. It is true that one of the physicians testified that child birth was an adequate and the usual cause of rectocele, and that he had not known of a case where rectocele was occasioned by a fall. But the other physicians differ with him in this regard. Dr. Stubbs testified that prolapsus of the posterior vagina wall, senile atrophy, violent muscular efforts of the abdominal muscles, a fall, or an attempt to save one's self from a fall, may produce rectocele. It is our duty to consider this evidence in connection with the fact that rectocele was discovered shortly after the plaintiff received her injury; that none had existed before, and that all of the symptoms following the injury were such as to indicate its existence.

Exceptions were taken to the refusals to charge as requested, but there are none which we think require a new trial. They have been considered by the General Term, and further discussion we do not consider necessary.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

MAY WILLIAMS, Respondent, v. CORNELIUS WILLIAMS,
Appellant.

180	193
158	689
180	193
155	72
155	184

130	193
173	*508

The term "desertion," as used in the law of divorce, contemplates a voluntary separation of one party from the other, without justification and with the intention of not returning.

The marriage relation is not a *res* within the state of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind an absent party, a citizen of another state, by substituted service or actual notice given without the jurisdiction of the court where the action is pending.

A judgment, therefore, of divorce rendered in another state against a resident of this state, where there has been no personal service of process within the state rendering it, and no personal appearance by the defendant in the action, is inoperative and void in this state.

Maynard v. Hill (125 U. S. 190); *Cheely v. Clayton* (110 U. S. 701), distinguished.

A state may adjudge the status of its citizens towards a non-resident, and so long as the operation of such a judgment is kept within its own confines, other states must acquiesce, but it has no effect beyond the limits of the state.

In an action for a separation the following facts appeared: The parties were married in this state in 1879; they lived together until in April, 1880, when defendant refused to permit plaintiff to live with him unless she would give up all intercourse with her mother; no reason was disclosed for imposing such condition, and plaintiff declining to accede to it, they did not thereafter live together. In 1882 defendant removed to Minnesota; before he left, plaintiff offered unconditionally in good faith to live with him; this he refused. He procured a divorce in Minnesota from plaintiff on the ground of desertion; she was personally served out of that state with the summons and complaint in the divorce suit. The judgment-roll therein was offered in evidence and excluded. *Held*, no error.

The court found as a fact that defendant had abandoned plaintiff, and rendered judgment as prayed for in the complaint. *Held*, no error; that defendant had no cause of action in this state against plaintiff for desertion; that plaintiff's act in leaving him was not voluntary, and upon her offer to return unconditionally, defendant was not justified in refusing to receive her; that plaintiff being legally the wife of defendant within this state, must be considered as legally entitled to all the rights flowing from that relation under the Constitution and laws of the state and of the United States.

(Argued October 22, 1891; decided December 1, 1891.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of May, 1889, which modified, and affirmed as modified, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to obtain a judgment separating the parties from bed and board forever, and was based upon an allegation that the defendant had abandoned the plaintiff in August, 1882, and refused to permit her to return to him.

The defendant denied the allegation of abandonment, and alleged that the plaintiff had abandoned him in 1880.

He further set up in his defense a judgment of divorce in his favor from the plaintiff, rendered in the District Court of Ramsay county, in the state of Minnesota, in January, 1884, which court was alleged to be a court of general jurisdiction under the laws of that state.

The parties were married in this state in 1879, and the defendant resided here until August, 1882, when he removed to Minnesota. The plaintiff continued to reside in New York, and was, at the commencement of this action, a resident of this state. The summons and complaint in the Minnesota action were personally delivered to her while temporarily stopping in Philadelphia. The judgment-roll in the Minnesota action was offered in evidence upon the trial and excluded.

The court found as a fact that the defendant abandoned the plaintiff in August, 1882, and gave judgment in accordance with the prayer of the complaint.

Further facts appear in the opinion.

Frank H. Platt for appellant. The judgment of the Minnesota court, granting an absolute divorce to the husband, was valid and binding on the wife in the state of New York, even though the summons was not served on the wife in Minnesota. (*Maynard v. Hill*, 125 U. S. 190; Const. U. S. art. 4, § 1; *Robinson v. Fair*, 128 U. S. 87; *Settlemeier v. Sullivan*, 97 id. 444; *Cheely v. Clayton*, 110 id. 701; *Cheever v. Wilson*, 9 Wall. 108; *Burlen v. Shannon*, 115 Mass. 438; Freeman on

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Judg. § 585.) The burden was on the wife to prove that, at the time of the service of the Minnesota process on her, she was not domiciled in a state where the Minnesota decree was deemed valid. (*Burlen v. Shannon*, 115 Mass. 438; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Moore v. Hegeman*, 92 id. 521.) The Minnesota judgment should have been admitted in evidence to show the status of the husband in Minnesota, and thereupon the New York decree should have been limited so as to except him from its operation at least in Minnesota. (*People v. Baker*, 76 N. Y. 78.) The court should have found as a conclusion of law, from the facts found, that the wife abandoned the husband in 1880. (Code Civ. Pro. §§ 1762, 1765; *Uhlman v. Uhlman*, 17 Abb. [N. C.] 261; *Barlow v. Barlow*, 2 Abb. [N. S.] 259; *Shaw v. Shaw*, 17 Conn. 195; *Fulton v. Fulton*, 36 Miss. 518; *Pierce v. Pierce*, 33 Iowa, 238; *Steen v. Steen*, 17 Conn. 189; *Hardin v. Hardin*, 17 Ala. 250; *People v. Pettit*, 74 N. Y. 320; *Waltermire v. Waltermire*, 110 id. 187; *Davis v. Davis*, 55 Barb. 133.) The wife having completely abandoned her husband in 1880, and having remained away from him for a long period, his defense on that ground, and even his right to a decree of separation, cannot be defeated by her later offers to return to him. (*Uhlmann v. Uhlmann*, 17 Abb. [N. C.] 261; *Benkert v. Benkert*, 32 Cal. 467; *Cargill v. Cargill*, 1 S. & T. 235; *Basing v. Basing*, 3 id. 516; *Hanberry v. Hanberry*, 29 Ala. 720.)

Austen G. Fox for respondent. The defendant's conduct in changing his residence from New York to St. Paul, Minnesota, with the intention of residing there permanently, his refusal to allow the plaintiff to accompany him, and his institution in Minnesota of proceedings to secure a divorce from the plaintiff, all show that before the commencement of this action he had abandoned the plaintiff. (1 Bishop on Mar. & Div. [6th ed.] 594, §§ 784, 786; *Magrath v. Magrath*, 103 Mass. 577; *Clearman v. Clearman*, 18 N. Y. S. R. 272; *Ahrenfeldt v. Ahrenfeldt*, Hoff. Ch. 47, 53; *Uhlman v. Uhlman*, 17 Abb. [N. C.] 237, 259, 260; *Mallinson v. Mallin-*

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son, L. R. [1 P. & D.] 94; *Yeatman v. Yeatman*, Id. 489, 491; *Dallas v. Dallas*, 31 L. T. 271.) In order to establish his affirmative defense that the plaintiff was guilty of abandoning him in April, 1880, the defendant was bound to prove, by a preponderance of evidence, that when the plaintiff took lodgings with her mother she did so finally and with the intention of not returning to the defendant, and the court having passed upon this question of fact adversely to the defendant this court will not review the determination thereof. (*Clearman v. Clearman*, 18 N. Y. S. R. 272; *Uhlman v. Uhlman*, 17 Abb. [N. C.] 260; 1 Bishop on Mar. & Div. § 1672; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. Ch. 47.) The finding of the court that, as matter of fact, the defendant had failed to establish that the plaintiff's act was final, or was done without the intention of returning, has ample support in the evidence and is not reviewable in this court. (*DeMeli v. DeMeli*, 120 N. Y. 485; *Justice v. Lang*, 52 id. 323.) Plaintiff's repeated efforts to bring about a reconciliation were more than enough to show both her own good faith and the defendant's duty to receive her. (1 Bishop on Mar. & Div. [6th ed.] § 810; *Fellows v. Fellows*, 31 Me. 342; *Grove's Appeal*, 37 Penn. St. 443; *Miller v. Miller*, Saxon's Ch. 386; *Hanberry v. Hanberry*, 29 Ala. 719; *Crow v. Crow*, 23 id. 583; *English v. English*, 6 Grant Ch. 580; *McGuchen v. McGahey*, 11 Johns. 281; *Blowers v. Sturtevant*, 4 Den. 46; *Cunningham v. Irwin*, 7 S. & R. 247.) The copy of a so-called judgment of a court in Minnesota was properly rejected. (Bigelow on Est. [4th ed.] 675; *Plummer v. Woodburne*, 4 B. & C. 625; *Frayes v. Worms*, C. B. [N. S.] 149; *Smith v. Nicolls*, 7 Scott, 147; *O'Dea v. O'Dea*, 101 N. Y. 23; *Jones v. Jones*, 108 id. 424; *Cross v. Cross*, Id. 630; *People v. Baker*, 76 id. 78; *DeMeli v. DeMeli*, 120 id. 485; *Stone v. Pease*, 8 Conn. 541; *Pennoyer v. Neff*, 95 U. S. 714.)

BROWN, J. The chief ground upon which the appellant asks a reversal of the judgment in this action is that the court erred in refusing to find as a conclusion of law that the plain-

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tiff had abandoned him two years prior to his leaving this state and taking up his residence in Minnesota.

The evidence is substantially undisputed that the defendant refused to permit the plaintiff to live with him, unless she absolutely gave up all intercourse with her mother.

The parties were married in June, 1879, and lived together in a house in 59th street in New York, until the latter part of April, 1880, when the lease thereof expired. When preparing to remove from this house, the defendant's command to his wife was: "When you leave this house, you are not to see your mother. * * * You shall not go where she is; you will have no communication with her; you shall not write to her—have no communication with her whatever. If you want to see your mother you cannot go with me."

The condition thus imposed upon the plaintiff was never withdrawn, and under it she refused to live with the defendant.

The cause for this disagreement is not disclosed in the record, but the evidence amply justified the conclusion that the plaintiff was always willing to live with the defendant if he would permit her occasionally to visit her mother, and before he left the state she offered unconditionally and in good faith to return to him, and this he refused to permit her to do, but left New York and took up his residence in Minnesota where he procured a decree of divorce against her.

Under these circumstances it is clear that the defendant never had a cause of action in this state against the plaintiff for desertion. That term as used in the law of divorce contemplates a voluntary separation of one party from the other without justification, with the intention of not returning.

It could not be said in this case that the plaintiff's act in leaving her husband was voluntary. It was coerced by a harsh and unnatural condition, and she was at no time unwilling to return and live with him as his wife if that condition was withdrawn.

The evidence discloses nothing more than a temporary separation of the parties because of a disagreement. There was no desertion by either party, and neither up to the time of the

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husband's refusal to receive the plaintiff, in the summer of 1882, had a cause of action against the other.

But upon the plaintiff's offer to return unconditionally, the defendant was without legal excuse in refusing to receive her. It is also claimed that it was error to refuse to admit in evidence the record of the Minnesota decree, and upon this point it is claimed that the rule heretofore prevailing in this state with reference to judgments of divorce rendered in other states against residents of this state where there was no personal service of process within the state rendering the decree and no personal appearance by the defendant in the action has been changed by recent decisions of the Supreme Court of the United States.

In support of this claim we are referred by the appellant to *Maynard v. Hill* (125 U. S. Rep. 190) and *Cheely v. Clayton*, (110 id. 701).

The latter case turned upon the construction of the statutes of the territory of Colorado relating to the service of a summons upon a non-resident, and following the decision of the highest court of the territory the Supreme Court held the service in the case before it defective and the decree void.

Maynard v. Hill was an action in equity to charge the defendants as trustees of certain lands in Washington territory and to compel a conveyance thereof to the plaintiffs.

The case involved the legality of a legislative divorce granted by the legislature of the territory of Oregon, but the consideration of this question was by the facts of the case confined wholly to the territory within which the decree was granted. Neither case questioned the rule prevailing in this state, and the decree in *Maynard v. Hill* goes no further than that a divorce granted without service upon or personal appearance of the defendant establishes the status of the parties to it within the state in which it was rendered. It does not overrule the decisions of this state, but it is in harmony with them, as it has never been denied by our courts that a state may adjudge the status of its citizens towards a non-resident, and that so long as the operation of the judgment is kept within

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its own confines other states must acquiesce. (*People v. Baker*, 76 N. Y. 78-84.)

This subject had very full and careful consideration in the case cited, which was an extreme one, and until it is squarely overruled by a court of ultimate authority, must and will be regarded as settling the law in this state. (*O'Dea v. O'Dea*, 101 N. Y. 23; *Jones v. Jones*, 108 id. 415-424; *DeMeli v. DeMeli*, 120 id. 485-495.)

It is also claimed by the defendant that the Minnesota decree should have been admitted in evidence for the purpose of limiting the effect of the judgment in this state.

This argument is based upon the anticipation that the plaintiff may seek to enforce the judgment for alimony in the jurisdiction where the defendant resides, and upon the fact that the plaintiff had actual notice of the pendency of the Minnesota action.

The argument is fully answered in the case of *O'Dea v. O'Dea* and *Jones v. Jones* (*supra*).

In the former case it appeared that the process of the Ohio court was actually delivered to the defendant, and she had notice of and was personally present at the taking of depositions on the part of the plaintiff in Toronto. This court held, however, that the Ohio court acquired no jurisdiction over her person, and that the decree was void.

In *Jones v. Jones* a decree of divorce granted in Texas, where service was made out of the state, was held valid on the sole ground that defendant appeared in the action and submitted herself to the jurisdiction of the court, but it was said in that case that "the marriage relation is not a *res* within the state of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceedings given without the jurisdiction of the court where the proceeding is pending."

The decree granted in Minnesota being void was properly excluded. It could not be considered as having any effect upon the status of the plaintiff.

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Being the wife of the defendant within this state, she must be considered as legally entitled to all the rights flowing from that relation under the Constitution and laws of the state and of the United States, and if the result be to compel defendant in the jurisdiction where he now resides to comply with our decree, that is a right to which she is entitled under the Constitution of the United States, and the courts of this state have no power to deny it to her.

The judgment should be affirmed.

All concur, except VANN, J., not voting.

Judgment affirmed.

AARON T. BATES, Appellant, v. THE LEDGERWOOD MANUFACTURING COMPANY, Respondent.

An equitable title to real estate is not a subject of levy and sale on execution. (1 R. S. 744, § 4.)

To vest a title in a *cestui que trust*, under the provisions of the Revised Statutes (1 R. S. 728, § 49, and 729, § 58), declaring that a transfer of real estate to one or more persons, to the use of or in trust for another, shall vest no estate or interest in the trustee, it is essential that the trust be declared by a deed or conveyance in writing (2 R. S. 134, § 6), and the trust must have existed at the time of the grant to the trustee.

In an action of ejectment, plaintiff claimed title under a sheriff's deed upon sale on execution against the F. D. Co. Upon the trial, plaintiff offered in evidence a judgment record, which showed that one R. purchased the premises and took conveyances, paying a portion of the purchase-moneys and giving his bonds, secured by mortgage on the premises, for the balance; that thereafter an arrangement was made between him and said company by which it assumed the purchases and became entitled to the benefit thereof, and thereupon it paid to R. the amount paid by him, and thereafter used and enjoyed the premises, paying interest on the bonds. *Held*, that the record was properly excluded; that the legal title was in R.; that the judgment record simply disclosed that the F. D. Co. had an equitable title subject to the mortgages, which title was not saleable upon execution; and so, that the sheriff's deed conveyed no title to the purchaser.

(Argued October 23, 1891; decided December 1, 1891.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 25, 1889, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Circuit.

This was an action of ejectment brought to recover the possession of certain lands situate in the county of Kings. The plaintiff alleged that the Fibre Disintegrating Company, a New Jersey corporation, was seized in fee and in possession of the premises on March 13, 1867, when one John Anson recovered against the company a judgment upon which was issued execution, by virtue of which the premises were sold and a sheriff's deed afterwards made to the plaintiff pursuant to the sale; that he had since then been seized in fee of such lands, and that the defendant unlawfully entered into and withheld the possession of the premises.

The defendant, by its answer, put in issue the material allegations of the complaint.

The plaintiff proved judgment of Anson against the Fibre Disintegrating Company, recovered March 13, 1867, in Supreme Court for \$484.22, and docketed same day in Kings county, executions issued March 16, 1867, and August 2, 1872, to the sheriff, who sold the premises on last execution and made certificate of sale to one Armstrong, who assigned it to the plaintiff, and in January, 1874, the sheriff made deed to him. Some further evidence was offered by the plaintiff and excluded. Thereupon the complaint was dismissed.

Further facts are stated in the opinion.

A. P. Bates for appellant. The fibre company was seized in fee. (*Wright v. Douglass*, 7 N. Y. 564; *Cook v. Barr*, 44 id. 156; 1 R. S. 736, § 4.) The purchase-money was fully paid in 1864, and the company was entitled to a deed. (*Cook v. Barr*, 44 N. Y. 168; 1 Greenl. on Ev. [5th ed.] § 211; *A. D. Co. v. Leavitt*, 54 N. Y. 35; *Libby v. Tuffts*, 121 id. 172; *Wright v. Douglass*, 2 id. 376; *Sage v. Cartwright*, 9 id. 49; *Kellogg v. Kellogg*, 6 Barb. 116.) The Statute of Uses and

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Trusts has no application to a case where a trust is expressly reserved by the instrument creating the grant, or declared by another instrument, relieving it from the effect of a secret trust. (*Woerz v. Rademacher*, 120 N. Y. 67; *Cook v. Barr*, 44 id. 158; *Crouse v. Frothingham*, 97 id. 112; *A. H. G. M. & M. Co. v. Andrews*, 120 id. 58; *Bloomer v. Sturgis*, 58 id. 174; *C. C. Bank v. Risley*, 19 id. 377.)

Harriman & Fessenden for respondent. The judgment-roll of the New Jersey court was immaterial, because a creditor's action in the courts of another state does not create a lien upon the real estate of the judgment creditor situated in this state, and the appointment of a receiver does not operate upon real property until obedience to an order directing the owner to convey to the receiver. (*Mitchell v. Bunch*, 2 Paige, 606; *Smith v. Tozer*, 42 Hun, 25; *C. Bank v. Reilly*, 19 N. Y. 377.) The judgment was not rendered material by reason of any equitable title shown by it in the Fibre Disintegrating Company. (1 R. S. 746, § 4; *Sage v. Cartwright*, 1 N. Y. 49; *Anson v. Allen*, 9 Paige, 74; *Garfield v. Hatmaker*, 15 N. Y. 475; *Niver v. Crain*, 98 id. 47; *Bogart v. Peary*, 1 Johns. Ch. 52; *Ocean Bank v. Olcott*, 46 N. Y. 12; *Wright v. Douglass*, 2 id. 373; *McCartney v. Bostwick*, 32 id. 57; *Murray v. Walker*, 31 id. 399; *Calvin v. Barker*, 2 Barb. 206; Gerard on Titles, 278; *Donovan v. Sheridan*, 5 J. & S. 256; *Timm v. Marsh*, 54 N. Y. 612; *Edwards v. Farmers' Co.*, 21 Wend. 496; *Jackson v. Parker*, 9 Cow. 82; *Smith v. Gage*, 41 Barb. 87.) Plaintiff in ejectment, relying on a conveyance to him from a grantor other than the state, must show that his grantor had either title or possession claiming title. (*Corning v. Miller*, 33 Barb. 386; *Hardenburgh v. Lakin*, 47 N. Y. 109; *Stevens v. Hauser*, 39 id. 302; *Smith v. Lawrence*, 12 Mich. 431; Abbott's Tr. Ev. 705; Sedgwick on Titles, 671.)

BRADLEY, J. The evidence introduced by the plaintiff failed to establish any cause of action against the defendant. The main

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questions arise upon the exceptions to exclusion of evidence, which, it is claimed on the part of the plaintiff, would have tended to prove that the Fibre Disintegrating Company had title to the premises in question at the time of the recovery by Anson against it in March, 1867, and upon which the judgment became a lien, and that by the sheriff's deed to the plaintiff the latter took such title. The question, therefore, arises whether the excluded evidence was sufficient to prove that the F. D. Co. had a title or interest in the premises salable by execution issued upon the judgment, through the sale on which plaintiff bases his claim to right of action. His offer was to introduce in evidence a record of the Court of Chancery of the state of New Jersey consisting of a bill, answer and decree, in which one Ogilby was complainant and the F. D. Co. and Robert W. Russell were defendants. By which decree one Morris was appointed receiver of the estate, right, title and interest of that company in the premises in question; also a conveyance in compliance with the decree by the company of all its title and interest in such lands to the receiver; and a conveyance by Morris, as such receiver, and Russell to the American Fibre Company, a corporation of the state of New York. This conveyance was made by the receiver pursuant to the power given him by the decree, and by Russell to comply in that manner with the direction in it for conveyance by him to the receiver.

The complainant was creditor of the F. D. Co., and the bill was filed in January, 1867, for the appropriation of the estate of that company in the lands to the payment of his claims, and amongst other matters, he alleged that on or about the 1st of February, 1864, Russell purchased the premises, took conveyance and after having paid a portion of it, gave his bonds secured by his mortgages upon the lands for the balance (\$30,000) of the purchase-money; that Russell having offered to transfer the benefit of his purchases to the F. D. Co., made an arrangement with it by which the company assumed the purchases and became entitled to the benefit of them, as appeared by certain resolutions of the executive committee of

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the board of directors of the company adopted in March and May, 1864; that thereupon the company advanced the amounts of the purchase-money paid at the time of the conveyances to Russell, and thereafter under such arrangement occupied, used and enjoyed the premises and had, up to 1866, paid interest on such bonds and mortgages and taxes. The allegations in the bill were admitted by the answers of the defendants, and decree was entered for the relief prayed for by the complainant. The deeds before mentioned referred to the bill and decree, and recited the adjudicating provisions of the latter. They were dated in March and April, 1867. The deed to the American Fibre Co. recited the adjudication that the F. D. Co. having become entitled to the benefit of the Russell purchases, owned the premises, having the equitable title thereto subject to such mortgages thereon.

It is urged that the bill answers decree and the deeds furnished evidence that the F. D. Co. was seized in fee and in possession of the premises subject to the lien of the judgment upon which the execution sale was founded and through which the plaintiff derived his alleged title. The legal title represented by the deeds was in Russell until the conveyance to the American Fibre Company; and the arrangement alleged in the complaint in the chancery suit between him and the F. D. Co., pursuant to which that company went into possession, gave to the latter the equitable title subject to the mortgages. The judgment was not a lien upon such equitable estate, nor was it salable upon execution issued upon such judgment. (1 R. S. 744, § 4; *Sage v. Cartwright*, 9 N. Y. 49; *Grosvenor v. Allen*, 9 Paige, 74.) So far as appears by the statement in the deed to the American Fibre Company executed by Russell, the F. D. Co. took its interest in the premises and possession by the arrangement between them made subsequent to the conveyance to Russell, and in assuming the purchases made by him it also assumed the payment of the purchase-money secured by his bonds and mortgages which he remained liable to pay to his obligees. And nothing appears to show that the company was entitled to take or perfect legal title to the premises

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until he was relieved from such obligations. A different question would have been presented if it had appeared, in the manner required by statute, that Russell had taken the conveyances in trust for the company. In that case the legal title would have vested in the company. (1 R. S. 728, 729, §§ 49, 58.) But to accomplish this, it was essential that the trust be declared by deed or conveyance in writing, etc. (2 R. S. 134, § 6.) And the trust must have existed at the time of the grant to the trustee, although it may have been effectually declared afterwards. (*Wright v. Douglass*, 7 N. Y. 564.) This the deed executed by Russell to the American Fibre Co. failed to do. And although the F. D. Co. advanced the money for the payments that were made upon the purchases, it cannot, in view of the statute, be held that the company took the legal estate by virtue of any trust resulting to it. (1 R. S. 728, § 51; *Garfield v. Hatmaker*, 15 N. Y. 475.) The evidence offered would have tended to prove no legal title in the F. D. Co., but at most only an equitable interest or estate derived from arrangement made with Russell subsequent to his purchase, and not subject to lien of the judgment; and as it could not be assumed, if the evidence had been introduced, that its possession was other than under such arrangement, the plaintiff was not prejudiced by its exclusion. The execution sale, under which the plaintiff claimed, was ineffectual to vest any estate in the sheriff's grantee. No evidence that the premises were in the possession of the F. D. Co. prior to the sale on the execution was introduced; and in view of the issue made by the answer, it contained no admission to aid, without further evidence, the claim of the plaintiff.

It follows that the judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

GEORGE L. PRATT, Appellant, v. THE DWELLING HOUSE
MUTUAL FIRE INSURANCE COMPANY of Orleans, Niagara
and Monroe Counties, N. Y., Respondent.

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It seems a director of a fire insurance company, or a member of its executive committee has no right to approve of his own application for a policy in such company.

An officer of such a company, however, is not debarred from making application for insurance, and if his application is accepted by another officer having authority to accept applications, the company is bound.

The officers of a corporation organized under the act providing "for the formation of county co-operative insurance companies" (Chap. 362, Laws of 1880, amended by chap. 171, Laws of 1881), have the same power to waive defects or ratify invalid policies as officers in a stock insurance company.

Evans v. Trimountain M. F. Ins. Co. (9 Allen 329); *Buffum v. Fayette M. F. Ins. Co.* (3 id. 360); *Priest v. Citizens' M. F. Ins. Co.* (Id. 602), distinguished.

Where insurance is made upon different kinds of property, each separately valued, the contract is severable, even if but one premium is paid, and the amount insured is the sum total of the valuations.

Plaintiff, who was secretary of defendant, a corporation organized under said act, presented a written application to it, signed by him, for insurance on certain property. The application contained a clause by which the plaintiff agreed to pay a sum specified, and such further sums as he should be required to pay under its rules and by-laws. The application was approved by indorsement thereon, made by an officer of the company authorized to approve applications, and the premium specified was paid by plaintiff. The application was presented to and approved by the executive committee at its next meeting, as prescribed by the by-laws, and it was in various ways recognized by the company. *Held*, that plaintiff was, by the approval and payment, insured until notice to the contrary was given to him.

By the by-laws of the company its policies were required to be signed by its president, or in his absence by the vice-president, and to be countersigned by the secretary. Plaintiff, pursuant to his application, filled out a blank policy, which had been signed by the vice-president. It contained a clause not permitted by the custom of the company. *Held*, that conceding the policy to be invalid, it did not affect the validity of the contract made by the application and approval; but that the policy was not rendered invalid by the fact that it was signed by plaintiff as secretary, as that is required both by the statute and defendant's by-laws; that it was not made void, but simply voidable, at the election of the company, by the fact that its terms had not been previously approved by some

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officer other than plaintiff; and as the evidence permitted the inference that the company, with full knowledge of the facts, ratified the policy, and no effort was made to avoid it until after the commencement of this action thereon, such efforts were ineffectual and the company was bound. *Pratt v. D. H. M. F. Ins. Co.* (53 Hun, 101), reversed.

(Argued October 26, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 22, 1889, which denied a motion for a new trial and directed judgment in favor of defendant upon a verdict directed by the court.

This was an action upon a policy of fire insurance alleged to have been issued by the defendant upon certain real and personal property belonging to the plaintiff. The answer denied that the defendant issued the policy in question, and alleged that the same was issued by the plaintiff, as secretary of the defendant, to himself, without authority, and that it was, therefore, void. It was further alleged that the real property covered by the policy was subsequently encumbered by a mortgage, given by the plaintiff, in violation of a clause in the contract prohibiting subsequent encumbrances without the consent of the company, and that the policy thereupon became void.

The defendant was organized under chapter 362 of the Laws of 1880, as amended by chapter 171 of the Laws of 1881. The business of the company, as stated in its by-laws, which are annexed to and made a part of every policy, is the "insurance of city and village dwellings and their accompanying outbuildings and their contents; farm houses and their accompanying outbuildings and their contents, and other property not more hazardous, against damage by fire or lightning."

The powers of the company, as the by-laws further provide, are vested in a board of twelve directors, who elect from their own number a president, vice-president, secretary and treasurer. In addition to the usual duties imposed on such officers, it is the duty of the president, or in his absence the vice-president, to sign all policies, which are to be written and countersigned by the secretary, who keeps the accounts, books

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and papers of the company, and acts as its general agent during his term of office. These three officers constitute an executive committee, possessing "all the powers of the board of directors when they are not in session," and are required to hold stated meetings on the second Saturday of January, April, July and October, to "examine and approve all applications on which policies have been written during the quarter next preceding, and cancel or modify all policies which they do not approve." Applications for insurance can be made to any director, but must be approved by one member of the executive committee before a policy can be issued. Any person insured by the company becomes a member thereof, and on sustaining a loss is required to "notify the secretary without delay and give any information required by the adjusting officers, and submit to examination under oath." The executive committee is authorized to adjust and settle all losses. "All applications for insurance, taken by a person duly authorized, take effect at noon of the date of the same, provided that the premium is actually paid. The property shall be held insured until the applicant is notified of its modification or rejection by the secretary." On the first of each month, agents and directors are required to report "to the office" the business done by them during the preceding month, and pay over the amount due to the company, and on the fifteenth of each month the secretary is required to pay over all funds on hand to the treasurer. The premiums charged are expected to pay all ordinary losses and expenses, but in case of an unusual loss, an assessment upon members may be made by the directors, who are to be convened for that purpose. The statute requires the president and secretary to make an annual report, under oath, showing the number of policies issued, the amount and kind of insurance and an itemized account of the moneys received by the company during the year. (Laws of 1881, chap. 171, § 10.) A supervisory committee, elected by the members, is required by the by-laws to examine the books and vouchers "and report their opinion thereon, verify the annual reports of the president and secretary made under the

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requirement of the statute and certify to the facts in the case as found by them under their hands and report the same to each annual meeting of the members." A copy of the annual report is mailed to each member of the company. The by-laws also provide that "applications for insurance and membership" must be made on "printed blanks prepared by the executive committee * * * without 'blanketing' for one member more than another."

Further facts are stated in the opinion.

John J. Ryan for appellant. As the premium was paid by crediting it to defendant on its books and turning over the proper amount therefor to Mr. Chamberlain, the new secretary, the contract was complete without the policy. (*Rhodes v. R. P. Ins. Co.*, 5 Lans. 71; *Whittaker v. F. U. Ins. Co.*, 29 Barb. 312; *Freid v. R. Ins. Co.*, 50 N. Y. 243-250; *Cooper v. P. M. Ins. Co.*, 7 Nev. 116; *Audubon v. E. Ins. Co.*, 27 N. Y. 216; *Perkins v. W. Ins. Co.*, 4 Cow. 645; Laws of 1880, chap. 362, § 1; Laws of 1881, chap. 171, § 1; Morawetz on Corp. § 370; Angell & Ames on Corp. § 325.) If it be contended that there existed any judicial function in Pratt, as secretary, in writing out policies or applications which had been regularly approved by another member of the executive committee — notwithstanding the by-laws — so as to render him incapable of issuing a legal policy for himself, then the law is that a policy so issued by him is not void, but simply voidable, at the option of the company. (Story on Agency [6th ed.], § 210; Paley on Agency, 33-36; 1 Liverm. on Agency, chap. 8, § 6; 3 Chitty on Cont. 216, 217, chap. 3; *Woodhouse v. Meredith*, 1 J. & W. 204, 224; *Morse v. Royal*, 12 Ves. 355; *Lowther v. Lowther*, 13 id. 95, 103; *Saunderson v. Walker*, Id. 601; *Fowler v. B. S. Bank*, 23 Abb. [N. C.] 158; *Boerum v. Schenck*, 41 N. Y. 182; *S. N. Bank v. Burt*, 93 id. 233, 246, 247; *Roulston v. Roulston*, 64 id. 654.) A voidable contract may be acquiesced in and ratified by the principal. (Bishop on Cont. § 846; Story on Agency, §§ 242, 244, 247, 248; *Hagedorn v. Oliverson*, 2 M. & S. 485; L. R.

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[9 Q. B.] 577; *Webster v. P. Ins. Co.*, 36 Wis. 67, 71; *N. M. L. Ins. Co. v. G. F. Ins. Co.*, 40 id. 446, 452; *Gans v. S. P. F. & M. Ins. Co.*, 43 id. 108, 111; *Joliffe v. M. M. Ins. Co.*, 39 id. 111.) If, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is, as matter of law, waived. (Wood on Ins. 951, 994, § 452; *Badger v. G. F. Ins. Co.*, 49 Wis. 390; *Webster v. P. Ins. Co.*, 36 id. 671; *P. F. Ins. Co. v. Kettle*, 39 Mich. 51; *Viele v. G. Ins. Co.*, 26 Iowa, 9; *Frost v. S. M. Ins. Co.*, 5 Den. 154; *Viall v. G. M. Ins. Co.*, 19 Barb. 440; *Carroll v. C. O. Ins. Co.*, 10 Abb. Pr. [N. S.] 166; *M. M. B. Assn. v. Beck*, 77 Ind. 203; May on Ins. § 505; *Gans v. S. P. F. & M. Ins. Co.*, 43 Wis. 108, 111; *Joliffe v. M. M. Ins. Co.*, 39 id. 111; *Erdmann v. M. Ins. Co.*, 44 id. 376; *Kabox v. P. M. L. Ins. Co.*, 21 N. Y. S. R. 203, 208; *Roswell v. E. A. Union*, 13 Fed. Rep. 840; 23 Abb. [N. C.] 145, 158; 3 Comyn's Digest, 614; *Sanger v. Wood*, 3 Johns. Ch. 416, 421; *Fowler v. B. S. Bank*, 23 Abb. [N. C.] 140; 2 Hermann on Estop. § 1204.) The contract was severable, and in any event plaintiff would be entitled to recover for the personal property. (*Merrill v. A. Ins. Co.*, 73 N. Y. 452; *Schuster v. D. C. Ins. Co.*, 102 id. 260; *Smith v. H. Ins. Co.*, 14 N. Y. S. R. 106-109.) All of Pratt's acts were ratified and all irregularities were waived, and having once thus elected, the company became irrevocably bound. (2 Hermann on Estop. § 1204; *Ames v. N. Y. U. Ins. Co.*, 14 N. Y. 253; *Liddle v. M. F. Ins. Co.*, 29 id. 184; *Frost v. Ins. Co.*, 5 Den. 154; *Bothen v. Ins. Co.*, 35 N. Y. 131; *Hotchkiss v. G. Ins. Co.*, 5 Mun, 90; *Benninghoff v. Ins. Co.*, 93 N. Y. 495; *Viall v. Ins. Co.*, 19 Barb. 446; *Goit v. Ins. Co.*, 25 id. 189.)

S. E. Filkins for respondent. The application was preliminary, when the policy was issued it then became the contract, and the application then ceased to have vitality; and

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the policy having been issued without knowledge of the company and without participation by any of its officers, it was an insurance by Pratt, the agent, upon his own property, without any authority whatever, and so voidable by the defendant, (Wood on Ins. § 102; *U. Ins. Co. v. T. Ins. Co.*, 17 Barb. 132; *Marie v. Garrison*, 13 Abb. [N. C.] 210; *Voltz v. Blackman*, 64 N. Y. 440; *A. R. Co. v. Blaikie*, 1 McQ. 461.) No act of the defendant rendered the application or policy unavoidable by it. There is no waiver or estoppel in this case. (*Krugh v. L. Ins. Co.*, 77 Penn. St. 15; Wood on Ins. §§ 102, 308, 542; 10 Metc. 216; 9 Allen, 329, 331; 3 id. 602; Id. 360; 14 Gray, 204; 11 Cush. 265; *Pitny v. G. F. Ins. Co.*, 65 N. Y. 6-21; May on Ins. §§ 146, 147, 148; 8 Gray, 28; 12 Cush. 469; 51 Penn. St. 402; 18 Ia. 319; Id. 425; 30 id. 133; 7 Cranch. 396; 58 Md. 463; 45 N. H. 292; 49 Md. 307; 112 Mass. 150; 45 N. J. 177.) The mortgage put upon the real estate without consent of the defendant in writing, was a clear violation of section 4, article 5 of by-laws; and rendered the policy void, so far as the real estate was concerned. (*Bailey v. H. F. Ins. Co.*, 80 N. Y. 21; *Green v. H. F. Ins. Co.*, 82 id. 517; *Colt v. P. F. Ins. Co.*, 54 id. 595; *McNierney v. A. Ins. Co.*, 48 Hun, 239.) There was nothing required of the plaintiff by the defendant concerning its investigation of the origin of the fire, or the amount of property destroyed; which was an acknowledgment of the validity of the policy or waiver of any forfeiture. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 410; *Lake v. A. Bank*, 3 Abb. Ct. App. Dec. 10.) All the facts which the evidence tends to prove bearing upon the question we must deem assumed by the judge with the plaintiff's consent. (*Price v. Keyes*, 1 Hun, 177; *M. N. Bank v. Sirret*, 97 N. Y. 320.) The doctrine of estoppel cannot apply to force a ratification. (*Baker v. U. M. L. Ins. Co.*, 43 N. Y. 283; *Robey v. A. C. Ins. Co.*, 120 id. 510.) But if this policy had once been valid, and if plaintiff had nothing but a forfeiture to overcome — yet there is nothing in this case which proves that the defendant, after knowledge of the forfeiture, had chosen to recog-

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nize the continued validity of the policy. (1 Wood on Ins. 204, § 102; *Robertson v. M. L. Ins. Co.*, 88 N. Y. 541, 545; *Weed v. L. & L. F. Ins. Co.*, 116 id. 118; *Munson v. S. G. & C. R. R. Co.*, 103 id. 73, 74, 75; *M. E. W. Co. v. M. R. W. Co.*, 14 Abb. [N. C.] 255.)

VANN, J. Upon the trial of this action there was a sharp conflict of testimony, but at the close of all the evidence, the court granted a nonsuit on motion of the defendant and the plaintiff excepted. As was said by the court in *Clemence v. City of Auburn* (66 N. Y. 334, 338), "the plaintiff did not assent to any proposition of fact assumed either by the counsel for the defendant or the court, and is not concluded by omitting to request that the whole case or any particular question should have been submitted to the jury. If in any view of the evidence a verdict might have been rendered for the plaintiff, or if there were questions of fact which might have been determined for the plaintiff, and which, if determined in his favor, would have entitled him to recover, the case should not have been taken from the jury." (*Sheridan v. Brooklyn City, etc., R. R. Co.*, 36 N. Y. 39; *Colt v. Sixth Ave. R. R. Co.*, 49 id. 671; *Train v. Holland Purchase Ins. Co.*, 62 id. 598.)

For the purpose of this review, therefore, all questions involving the credibility of witnesses must be resolved in favor of the plaintiff and such facts deemed established as upon any reasonable view of the evidence, the jury could have found in his interest.

The facts, as the jury might have found them had the case been submitted to them for decision, are as follows: On Saturday, July 11, 1885, the plaintiff, who had been the secretary of the defendant ever since its organization, filled out a blank application for insurance upon his own property, intending to present it to the executive committee, which was required by the by-laws of the company to meet in quarterly session on that day. The application was for insurance to the amount of \$500 on a wine house and cellar belonging to the plaintiff,

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and \$1,500 on his personal property kept stored therein, and was in the usual form, except that the custom of the company did not permit personal property to be described by a blanket clause. The application was signed by the plaintiff, who by the last clause thereof, agreed to pay to the defendant the sum of \$11 and bound himself to pay it such further sums as should be necessary to meet all legitimate losses and expenses, according to its rules and by-laws. The executive committee, which was at this time composed of Edward E. Russell, George Brown and the plaintiff, by virtue of the offices then held by them, respectively, of president, vice-president and secretary, held no meeting that day, as no one attended, except the plaintiff. Within a day or two the plaintiff met Mr. Brown, and handing him the application, told him that he wished to apply for insurance on his wine house. Mr. Brown took the application in his hands, opened it, looked it through as if reading it and then indorsed his approval thereon as a member of the executive committee, by writing his name in the proper blank space, as the plaintiff had done before him. The plaintiff then went to the office of the company, filled out a policy to himself, according to the application, and signed it as secretary, Mr. Brown having already signed it with others, in blank, as vice-president. At the same time the policy was entered on the "policy register" by Mr. Pratt, as follows, the heads of the columns and the entries beneath being given as if continuous: "Number of policy, 747; name of insured, George L. Pratt; post-office, Ridgeway, Orleans county; date, July 11, 1885; term, three years; amount insured, third class, \$2,000; amount of premium, \$10; total amount insured, \$2,000; total amount of premium, \$10." He also charged himself on the ledger with the amount of the premium, \$10, and credited himself with \$1 as the commission on the same to which he was entitled according to the by-laws. He filed the application with the papers of the company, took the policy home and put it with his other policies, one at least of which was issued by the defendant, but under what circumstances, or by whom signed, did not appear. The first

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policy ever issued by the defendant was to the plaintiff on this same wine house and cellar. It was based on an application approved by the plaintiff, Mr. Brown and one Downey, who was president at the time, was written and countersigned by the plaintiff, as secretary, and continued in force for three years, and until it expired by limitation. The next quarterly meeting of the executive committee, after the application in question had been made, was held October 10, 1885, and all of the members were present. According to the testimony of the plaintiff eleven applications, including his own, were presented to and approved by the committee at that meeting, and were so recorded on the minutes of its proceedings, as kept by him. Some of the applications were approved by the indorsement of names thereon, but none in the bundle containing the plaintiff's were so indorsed. Mr. Russell, the president, when requested by the plaintiff to look over those applications, said: "If they have two names on, I wont bother with them. I want to make this next train." The application in question was not otherwise shown to Mr. Russell at that time and he did not examine it, or any other in the package containing it. The applications were always thus presented to the committee "in bulk." In December, 1885, the plaintiff mortgaged the premises insured to one Salisbury and, as secretary of defendant, indorsed its consent thereto, both upon the policy and the application. The premium accompanying the application was paid over, with other moneys, to the treasurer of the company and still constitutes a part of its assets. It does not appear that an annual report was made at the close of the year 1885, except as it may be presumed that the statute was obeyed, nor whether this policy and premium were included in the statement of the affairs of the company as required by law. (L. 1881, ch. 171, p. 217, § 14.) On January 19, 1886, one Chamberlain was elected secretary in the place of the plaintiff, who thereupon delivered all the books and papers of the company, including the application in question, to that officer. In December of the same year the plaintiff called on Mr. Chamberlain to renew a policy

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on his dwelling-house then about to expire, and asked him to produce said application on the wine-house and another on his tenant-house, stating that the policies were with Mr. Salisbury and he wished to see when they expired. The application was thereupon produced by the secretary, having thereon in plain sight the consent to the mortgage and the approval of Brown and Pratt only. The annual report for the year 1886, sworn to by the president and secretary, stated that one hundred and ninety-four policies were then in force, one of them being the policy in suit, and that the amount of the outstanding risks was \$235,521, which included the risk in question of \$2,000. The report also stated the cash on hand, including in the aggregate, but not specifically naming, the premium paid by the plaintiff. The supervisory committee, appointed to examine the books, verify the annual report and certify the facts as found by them, reported that after making a full examination of the books and comparing them with the financial report of the president and secretary, they found that the figures agreed.

On Tuesday, August 2, 1887, more than two years after the date of the policy and eighteen months after the plaintiff had ceased to be secretary, the wine-house, cellar and contents were destroyed by a fire, which occurred at midday. The value of the property burned largely exceeded the amount of insurance thereon. That same afternoon the plaintiff asked Mr. Chamberlain, who was still secretary, to let him see the application, stating that his policy was with Mr. Salisbury and he did not remember the amount of his insurance. Mr. Chamberlain handed him the application and, after it had been examined, took it back. The next day formal notice of the loss was given to the secretary, and two days later the executive committee met the plaintiff, when the president, Mr. Downey, asked him if he had brought his policy. He answered that he had not, as it was in the control of Mr. Salisbury as collateral security to a mortgage. The application was produced and the blanket clause criticised. On being asked if he had made out a list of his loss, plaintiff answered no, and later in the day the president furnished him with blank proofs of loss and requested

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him to fill them up that evening, which he did, and delivered them to the secretary the next day. The same day the committee called on him at his house and asked to see his books, and when they were produced, he was informed that they wanted to know what his sales were for the past year, and he said that he would figure it up and let them know. Soon after he took his journal to the committee, gave them the amount of his sales for 1884, 1885 and 1886, and on being told that they wanted to go further back, he went for another journal, but could not find it. He was asked if he could not get at it in some other way, and thereupon spent about an hour in picking the accounts out of his ledger, and as he read them off the secretary took down the amounts. He was told to continue the work with the secretary the next day, which he did for half an hour, when, having found the missing journal, he furnished the rest of the information in five or ten minutes. Soon after he filed with the secretary an additional proof of loss. Each proof of loss comprised many items and both together fill over seven printed pages of the case. During these repeated interviews with the adjusting committee, Mr. Brown, the vice-president, and the director who approved the application, was present, and the committee with full knowledge of all the facts, did not elect to avoid the policy, but in all that they said and did, prior to the commencement of the action, treated it as a subsisting contract, valid in origin and valid at the time of the fire. No offer was ever made to return the premium, although there is no provision for its forfeiture to the company in case the risk never attached or the policy became void.

The main question presented for decision is, assuming that these facts were established, could the jury have found, under proper instructions from the trial court, that there was a valid contract between the parties. The plaintiff could not insure himself in the name of the defendant, and if the supposed contract rested on his action alone, there would be no room for serious controversy. (*Neuendorff v. World Mut. Life Ins. Co.*, 69 N. Y. 389.) But the acts of others, who represented

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the defendant only, intervened, and it is claimed that through their action the company waived its right to avoid the policy and ratified it as a good and binding contract. While the plaintiff had a right to fill out his own application, he had no right to approve it, either as a director or as a member of the executive committee, because it is the policy of the law to prevent an agent, entrusted by his principal with the discharge of duties involving the exercise of judgment and discretion, from making a contract, in which he has a personal interest, that may conflict with the interest that he is bound to protect as the agent of another. (*N. Y. Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Voltz v. Blackmar*, 64 id. 440; 1 May on Ins. [3d ed.] § 125.) Mr. Brown, however, was under no such disability, but as a director he was empowered to receive, and as a member of the executive committee to approve, the application. His approval and the payment of the premium bound the risk, and, by virtue of the by-laws, the plaintiff was thereby insured until notice to him of the contrary, which was never given. The learned trial judge was inclined to this view, but he held that when the policy was issued, the application had fulfilled its office, and that the insurance from that time depended on the policy and not on the application. But if the policy was void, or if voidable and it was avoided by the company, how could it affect the valid application, which was not dependent upon it? A voidable act, when lawfully declared void, is the same as if it had been void *ab initio*. Can an act, void in inception or by due declaration, have any legal force? Can a valid contract be merged into a void contract? Can that which does not exist, and is the same as if it never had existed, destroy that which does exist? Moreover, the statute under which the defendant was incorporated, provides that all policies shall be signed by the president and secretary; that the president and secretary shall be directors; that the directors shall be members, and that every person, in order to become a member, must sign an application for insurance. Does not the statute, therefore, contemplate that the secretary shall sign his own policy?

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How otherwise can its commands be obeyed, for the secretary is required to sign all policies, and he is also required to take out insurance? But the signing by the secretary would be merely clerical, if the terms of the contract had been previously assented to by other officers of the company, and we refer to the statute simply to show that the policy was not void because signed by the secretary. We think, however, that it was voidable at the election of the company, because its terms had not been previously approved by some officer who represented the company only. Such was the position taken by the defendant when moving for a nonsuit. Therefore, when the executive committee met on October 10, 1885, a valid application, effective as an insurance contract, had been made and a voidable policy issued thereon. The defendant, through Mr. Brown, knew of the former, but is not shown to have known of the latter, except inferentially. If the plaintiff is to be believed, the application was then approved by the executive committee and the temporary insurance thereby rendered permanent. (*Fried v. Royal Ins. Co.*, 50 N. Y. 243; *Audubon v. Excelsior Ins. Co.*, 27 id. 216.)

After the new secretary came in and the application, together with the books containing entries relating to the policy and the premium thereon, were turned over to him, the company had the means of knowing that a policy had been issued. His attention was called directly to the subject some months later when the plaintiff asked him for this application and he produced it. The premium paid by the plaintiff passed through the usual channel into the defendant's treasury, where it still remains. At the close of the year 1886, the officers, of whom plaintiff was not then one, included the policy and its amount in their annual report, not by specific mention, but necessarily counting it to make out the number and amount reported. The supervisory committee, after making a full examination of the books, certified that the report was correct. The books, with their "perfect record of all the transactions of the company," were required by law to be "kept open for the inspection of every member," every

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day except Sundays and legal holidays. (L. 1880, ch. 362, p. 541, § 5.)

A year and a half after the plaintiff went out of office, the fire occurred, and the executive committee, after receiving specific notice that a policy had been issued, and that it was in the hands of the mortgagee, met as an adjusting committee. With the open application in their hands, and without a word to indicate that they elected to avoid the policy, they met the plaintiff, asked him to fill out the blank proofs of loss which they gave him, called for his books, required him to furnish information, which they knew involved trouble and loss of time to obtain, and not until the action was commenced, so far as appears, was any step taken to avoid the policy. We think that the evidence permitted the inference that the company, with knowledge of the facts, ratified the policy, and that the effort to avoid it, after suit begun thereon, was wholly ineffectual. (*Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Roby v. American Central Ins. Co.*, 120 id. 510; *Hyatt v. Clark*, 118 id. 563.)

A question as to the power of defendant's officers to waive or ratify is raised by the defendant, and we are asked to decide it. The argument is made that there is a distinction between stock and mutual companies, because the insured has no voice in the former while he is a part of the insurer in the latter; that each officer is his agent to a limited extent, and cannot waive the obligations of one member to the other, as he is their agent also. The act under which the defendant is organized provides that every person insured shall sign an application for insurance and thereby become a member; that the members shall choose directors, who are to elect the officers, and that the business and corporate powers of the company shall be transacted and exercised by the board of directors, subject to the by-laws; that by-laws may be adopted by the directors, and may provide for an executive committee for such purposes as may be necessary; that the directors may issue policies insuring against damages by fire or lightning. (L. 1880, ch. 362, and L. 1881, ch. 171.) Thus it appears that the defendant

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is a corporation, engaged in the business of fire insurance. Its members have no direct power in the management of its affairs. Their power is confined to the election of directors, to whom the business and corporate powers of the company are exclusively confided by law. The relation of a member to the corporation is somewhat analagous to that of a stockholder in a stock company. We see no reason for holding, and we have been referred to no case in this state which holds, that the officers of such a corporation have less power to waive defects or ratify invalid policies than corresponding officers in stock insurance companies.

We have been referred to certain cases in Massachusetts, holding that where the members of a mutual insurance company by formal vote prescribed the form in which their policies should be made, and had thus deliberately determined the liability which they were willing to assume, the officers of the company could not waive such stipulations of the policies and by-laws as constituted the substance and essence of the contract, although they could waive service of proofs of loss and the like. (*Evans v. Trimountain Mut. Fire Ins. Co.*, 9 Allen, 329; *Buffum v. Fayette Mut. Fire Ins. Co.*, 3 id. 360; *Priest v. Citizens' Mut. Fire Ins. Co.*, Id. 602.)

These cases are not analagous, because the statute under which the defendant exists confers no power upon its members to make by-laws, determine the form of the contract, or do anything except elect directors, who constitute the governing body and wield all the power that the corporation possesses. We think that defendant's officers had the same power with reference to the subjects of waiver and ratification that is possessed by the officers of stock companies. (2 Herman on Estoppel, § 1204 and cases cited.)

The position of the defendant that the policy of the plaintiff, even if once valid, became void on account of the mortgage to Salisbury, requires little attention, because the nonsuit was not moved for on that ground.

If the existence of the mortgage had been made a basis of the motion, *non constat*, further proof would have been given

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upon the subject of consent, and any difficulty in that regard thus avoided. (*Isham v. Davidson*, 52 N. Y. 237; *Adams v. Greenwich Ins. Co.*, 70 id. 166.) Moreover, the condition in regard to encumbrances affected nothing except the real estate, which was but part of the subject of insurance, and a breach thereof did not affect the remainder of the contract, as it related only to the personal property which was not mortgaged.

Whatever the rule may be elsewhere, it is settled in this state that where insurance is made on different kinds of property, each separately valued, the contract is severable, even if but one premium is paid and the amount insured is the sum total of the valuations. (*Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; *Schuster v. Dutchess Co. Ins. Co.*, 102 id. 260; *Smith v. Home Ins. Co.*, 14 N. Y. St. Rep. 106; *Woodward v. Republic Fire Ins. Co.*, 32 Hun, 365.)

The claim of the defendant that the plaintiff procured the approval of Mr. Brown and of the executive committee by concealment and fraud, involves a question of fact. We think that the motion to nonsuit should have been denied and the case submitted to the jury, and the judgment should, therefore, be reversed and a new trial granted, with costs to abide event.

All concur.

Judgment reversed.

THE WALDEN NATIONAL BANK, Respondent, v. CALEB BIRCH
et al., Appellants.

Inasmuch as no penalty is imposed either upon the bank or the borrower by the National Banking Act (U. S. R. S. § 5201) for a violation of the provision thereof prohibiting a national bank from making any loan or discount on the security of the shares of its own capital stock, except as specified, such violation may not be urged against the validity of the transaction by anyone except the government; at least, unless the objection was raised before the contract was executed or while the security was in the hands of the bank.

In an action upon a bond given by one R. to plaintiff, a national bank, conditioned for the faithful performance by R. of his duties as plaintiff's cashier, these facts appeared: One T., who owned certain shares of plaintiff's stock and who was indebted to it, desiring to have his notes

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discounted to apply upon such indebtedness, under an arrangement made with R., as cashier, and for the purpose of securing the notes, and to avoid said prohibition, assigned his stock to R. individually, and the same was transferred to the latter on the books of the bank. The notes were thereupon indorsed by R., discounted by plaintiff and the proceeds applied in payment of T.'s indebtedness. The certificates of the stock were thereafter held by the bank, the dividends thereon being applied to pay the interest on the notes. Subsequently R. assigned the certificates to other banks as collateral security for loans made to him, which not having been paid, the collaterals were sold and R.'s indebtedness paid out of the proceeds. The notes so discounted by plaintiff were not paid. *Held*, that conceding the transaction was in violation of the said act, defendants could not avail themselves thereof as a defense; that R. took and held the stock in trust for the bank, and it was the equitable owner thereof, subject to the right of T. to redeem it; and that the transfer thereof by R. was a violation of his duty, and so, a breach of the condition of the bond.

The bank brought action and recovered judgment on the notes against R., as indorser. *Held*, that this was not a waiver of the right to sue him in tort for the misappropriation, and so, was not a waiver of the right to sue the sureties for the damages caused thereby; that the two remedies were not inconsistent, but concurrent.

(Argued October 26, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1889, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action to recover from the defendants, as sureties of one Rutherford, cashier of the plaintiff's bank, the value of certain of its securities alleged to have been converted by him.

The trial court found the following facts: Said Rutherford was cashier of the plaintiff, a national bank, from its organization until March 19, 1887, except during a few months in the year 1886, when he was ill. The bond in question, dated February 2, 1887, is in the penalty of \$4,000, and contains the condition that if said Rutherford, "honestly and in good faith, performs all the duties of cashier in the Walden National Bank and all the duties in any manner incident thereto while

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acting as such cashier, and also all such duties, acts and work as may be required of the said William G. Rutherford by the said bank or its board of directors, which shall from time to time be assented to on his part, and in all respects conduct honestly and in good faith toward or in respect to said bank, its moneys and securities and the moneys and securities of any other person or persons left in any manner with said bank, then the above obligation to be void, otherwise to remain in full force and virtue." Prior to December 12, 1882, one Terbell owned thirty shares of the stock of said bank of the par value of \$100 per share, and on that day he assigned and delivered the same to said Rutherford, in his "individual name," and thereupon it was transferred to him on the books of the bank, and three new certificates for ten shares each were issued to him therefor. At this time Terbell was indebted to the bank to an amount exceeding \$9,000 upon certain notes made or indorsed by him and discounted by the plaintiff for his benefit. He was not indebted to said Rutherford, but was in financial difficulties and wanted to secure the bank. Said stock was thus transferred to Rutherford upon the understanding "that it was to be held for the bank as collateral security for the payment of" said notes. The transfer "took place over the counter of the bank while said Rutherford was acting as its cashier, and the transaction was with him in that capacity." Said Terbell "understood he was dealing with the bank and not Rutherford personally, and the only reason given at any time for assigning the stock to Rutherford instead of the bank was, as Rutherford told Terbell, because the Banking Act prohibited the bank from making loans upon the security of its own stock." "Said cashier, after the transfer aforesaid, put said stock in an envelope and informed the president of the bank that it belonged to Terbell, and the bank thereafter held such stock as security for Terbell's paper, although it held it in Rutherford's name." December 20, 1883, Terbell made his note for \$1,000, and April 1, 1884, another for the same amount, each payable to the order of Rutherford and indorsed by him, and the plaintiff discounted both for said Terbell, and

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at the time "held said bank stock as security for the payment" thereof, under the aforesaid agreement. The indorsements of Rutherford "were in form only, and was only done to make the transaction appear regular under the National Banking Laws." The note dated April 1, 1884, was given to take up a note made by Terbell and held by the plaintiff on December 12, 1882, or in renewal of a note given for that purpose. September 1, 1886, at the request of Terbell and the plaintiff, Rutherford sold ten shares of said stock to the defendant Snyder for \$1,210, which was applied on the indebtedness of Terbell to the bank, except a small sum, which was placed to his credit on the books. Up to this time the dividends upon the stock had been credited to Terbell, and after this sale the dividends upon the twenty shares remaining were equal to the interest on said two notes, and "they were balanced in that way by the cashier, said Rutherford."

January 13, 1887, Rutherford borrowed \$1,000, upon his own note and for his own use, from the Goshen National Bank, to which he gave as collateral security ten shares of said stock. The note was not paid, and the bank last named sold said collateral and with the proceeds paid the note. March 18, 1887, Rutherford borrowed another \$1,000 upon his own note and for his own use, from the Chase National Bank, and assigned to it the remaining ten shares of said stock as collateral. That note was not paid, and that bank sold its collateral and paid its note out of the proceeds.

Neither of the notes so held by the plaintiff was ever paid, although payment was duly demanded, and no part of said twenty shares of stock was ever returned to the plaintiff, notwithstanding due demand made of said Rutherford.

September 10, 1887, the plaintiff recovered judgment on its notes against Terbell and Rutherford, but no part thereof having been paid, an offer was made to the defendants to assign the same to them, "but they declined to do anything about the matter."

Upon the request of the defendants the court also found that the notes made or indorsed by Terbell and held by the

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plaintiff on December 12, 1882, with two or three unimportant exceptions, had upon them the name of a responsible maker or indorser in addition to that of Terbell.

The trial judge refused to find upon the like request that "the transfer of said stock by said Terbell was made to said Rutherford, and held by him in his individual capacity as a personal matter, and he did not take and hold the stock as cashier for the plaintiff and as collateral security to the indebtedness to and for said bank," and after so refusing, added: "Rutherford was not liable as an indorser, though one in form." The defendants excepted generally, but did not except specifically to the addition as found.

After finding these facts, the trial court found as conclusions of law that the transaction was not prohibited by the National Banking Act, and if it was, that the defendants could not take advantage of it in this action; that Rutherford was not liable to the bank as indorser on said notes, and that the recovery of said judgment does not help the defendants, because the rule as to election of remedies does not apply; that the defendants were not liable for the stock given to the Goshen Bank on the 13th of January, 1887, because they were not then the sureties of said Rutherford, but that they were liable for the value of the other ten shares delivered to the Chase Bank March 18, 1887, as that was after they had signed said bond.

Rutherford died in March, 1888, and this action was commenced about two months afterward.

A. S. Casseddy for appellants. Rutherford indorsed the notes in question as an individual, became personally liable to the bank, and held the stock to secure his indorsements. The bank's acts are in harmony with such position, and his sureties are not liable. (*Wheelock v. Cost*, 77 N. Y. 296; *Magruder v. Colston*, 44 Md. 349; *Hale v. Walker*, 31 Iowa, 344; *Dedham Bank v. Chickering*, 4 Pick. 314; *Brandt on Suretyship*, 314; *Miller v. Stewart*, 9 Wheat. 680; *In re B. H. M. Co.*, 2 Pick. 223; *People v. Pennock*, 60 N. Y. 421;

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McClusky v. Cromwell, 11 id. 590.) The transaction if as claimed by the bank and found by the court, was not in line of the regular duties of Rutherford as cashier, was out of the ordinary course of business, was not contemplated by the sureties and covered by the bond. (*Moore v. M. N. Bank*, 55 N. Y. 41.) The transaction was intended to be an evasion of the provisions of the United States Banking Act, and was in violation of the act. (*Bank v. Lanier*, 11 Wall. 369; *Nat. Bank v. Stewart*, 107 U. S. 676.) If Rutherford, as cashier of the bank, held the certificate of stock for the bank, then the transfer from the Chase National Bank to George W. Stoddard, one of the directors of the plaintiff, and its president, was made to a person who had notice of the rights of the bank, and who was not a *bona fide* purchaser. (*McNeil v. T. N. Bank*, 46 N. Y. 325; *Moore v. M. N. Bank*, 55 id. 41, 47.)

B. R. Champion, for respondent. The defendants' claim that the transaction, conceding that the bank held the stock as collateral, although held in Rutherford's name, was a device to avoid section 79 of the Banking Act (5201 of the U. S. Revised Statutes), and was, therefore, illegal, is untenable. (*F. N. Bank v. Stewart*, 107 U. S. 676; *Nat. Bank v. Whitney*, 103 id. 443; *Fortier v. N. O. Bank*, 112 U. S. 439; *U. G. M. Co. v. R. M. N. Bank*, 96 id. 640; *Thompson v. S. N. N. Bank*, 113 N. Y. 325.) The defendants are liable. They agreed that Rutherford "should honestly and in good faith perform all the duties of cashier, and in all respects conduct honestly and in good faith toward or in respect to said bank, its moneys and securities, and the moneys and securities of any other person or persons, left in any manner with said bank." (*Barrington v. Bank of Washington*, 14 S. & R. 165; *R. C. Bank v. Elwood*, 21 N. Y. 88; *Bostwick v. Van Voorhis*, 91 id. 353; *F. N. Bank v. Spinney*, 120 id. 560; 87 Penn. St. 419.) The taking of the judgment by the plaintiff against Terbell and Rutherford is no bar to the present action against Rutherford's sureties. (*Emery v. Baltz*, 22 Hun, 434; 94 N. Y. 408; *Stowell v. Chamberlain*, 60 id. 272; *Bowen v.*

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Mandeville, 95 id. 237.) Considerable evidence was given by the appellants, from the records of the bank, to show extensions of time to Rutherford to make good the stock appropriated by him. Such extensions did not relieve the sureties, they were without consideration, and the sureties lost nothing by them. (*Bd. Suprs. v. Otis*, 62 N. Y. 88; *Clark v. Sickles*, 64 id. 231; *A. & P. T. Co. v. Barnes*, Id. 385.) The appellants objected on the trial to Terbell's testimony of his transactions with the bank as immaterial and improper. The ruling of the trial judge was correct. (*Bd. Suprs. v. Bristow*, 99 N. Y. 316.)

VANN, J. The appellants claim that the transaction whereby the stock in question was transferred to Rutherford was in violation of the National Banking Act, which provides that no banking association "shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith." (U. S. R. S. § 5201.) Assuming this to be true the defendants cannot take advantage of it, because the act "imposes no penalty, either upon the bank or borrower, if a loan upon such security be made." (*National Bank of Xenia v. Stewart*, 107 U. S. 676.) The case cited was an action by the personal representatives of a borrower to recover from a national bank the value of certain shares of its capital stock delivered to it as collateral at the time the loan was made and, after default in payment of the note, sold by the bank and applied on the debt. The court held that if the prohibition of the statute could be urged against the validity of the transaction by anyone except the government, it could only be done before the contract was executed and while the security was still subsisting in the hands of the bank.

The decisions of the federal courts, construing the provision of said act which prohibits national banks from purchasing, holding or conveying real estate, except for certain purposes, are analogous, because no penalty is provided for a violation

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of that section (U. S. R. S. § 5137). While it permits banks to purchase and hold such real estate "as shall be mortgaged to it in good faith by way of security for debts previously contracted," it prohibits the taking of a mortgage to secure future advances, but does not declare void any security taken in violation of the act. It has been repeatedly held that a mortgage, although taken to secure future advances, is a valid and enforceable security, notwithstanding the prohibition and that only the federal government can take advantage of the violation of the statute. (*National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 id. 99; *Fostier v. New Orleans National Bank*, 112 id. 439.)

In *Wyman v. Citizens' National Bank* (29 Fed. Rep. 734), it was held that a contract was not void, if entered into by a national bank in violation of section 5200, which provides that "the total liabilities" to such a bank of any person, corporation or firm, shall not exceed one-tenth of its capital stock, actually paid in. The court said that "the decisions of the United States Supreme Court, heretofore made, warrant the conclusion that objections of the character presented to a breach of the banking law by a national bank can only be urged by the government."

Similar decisions have been made by this court under somewhat similar circumstances. (*Thompson v. St. Nicholas National Bank*, 113 N. Y. 325, 334; *Atlantic State Bank v. Savery*, 82 id. 291.)

The principle on which these cases rest applies to the point under consideration and requires us to hold that even if the transaction with Rutherford was a mere evasion; and hence a violation of, the provisions of the National Banking Act, the fact is not available as a defense to this action.

The claim of the defendants that Rutherford held the stock to secure him for indorsing the note in question is not supported either by the findings or the evidence. The transaction was not with Rutherford as an individual, but as cashier of the bank. No evidence was given upon the subject except by Mr. Terbell who testified: "When I go to the bank and a

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man comes to the hole and I tell him anything, I consider I am saying it to the bank. This conversation was over the counter in the Walden bank. * * * I so transferred it (the stock) to him individually to secure the bank. I did not make it directly to the bank because I supposed he was the bank. He indorsed these two notes * * * when I wanted him to pin the stock on these notes he said: 'When the government official comes here, we can't take our own stock, and when he comes here and sees this stock pinned on these notes, he will say: 'You sell it right off and pay this.' 'I will indorse them and will tell the board how it is.' The object was to get rid of the provision forbidding banks to take their own stock, and so I made the stock to him. He indorsed the paper to get around that. * * * When Rutherford took this stock away he put it in an envelope and I think told Mr. Scofield, then president of the bank, if anything happened, that belonged to me." Thus it is clear that Rutherford, as cashier, took and held the stock in trust for the bank and indorsed the notes simply to deceive the government. He had no personal interest in the matter. All that he did was for the benefit of the bank in the transaction of its business, as its officer. His object was to get security for the bank, which was in the line of his duty. The method adopted by him to effect his object was the transfer of the stock, not to the bank directly, as that was deemed inadvisable, but to himself still acting as cashier, for the benefit of the bank. His indorsement, although a contract in form, was no contract in reality, unless made so by subsequent adjudication, but an artifice resorted to by him, while doing the business of the bank, to deceive the official inspector, for its protection. In no part of the transaction did he act for himself. The plaintiff, therefore, became the equitable owner of the stock, subject to the right of Mr. Terbell to redeem. When Rutherford appropriated the stock to his own use, he deprived the bank of that which belonged to it as the beneficial owner, and which was in his name, and the evidence thereof in his custody, by virtue of his official relation to the bank. Although he may not have been guilty, under the cir-

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cumstances, of strict conversion, he was guilty of misappropriating the property of the bank that had been entrusted to him as its cashier. This was in violation of his duty to the plaintiff and of the bond given by the defendants in his behalf.

The defendants further claim that even if Rutherford held the stock for the benefit of the bank and in his capacity as cashier, still by recovering judgment against him as indorser, the plaintiff waived its right to sue him in tort and thereby deprived the defendants of a substantial right in case they should pay the bond.

Although Rutherford, upon the facts herein as found by the Special Term, had a perfect defense to the action brought against him on the notes, still the judgment entered by default was an adjudication irrevocably establishing a contract of indorsement between him and the plaintiff. (*Lorillard v. Clyde*, 122 N. Y. 41; *Brown v. Mayor, etc.*, 66 id. 385; *Newton v. Hook*, 48 id. 676; *Gates v. Preston*, 41 id. 113.) If this was a waiver by the bank of its right to sue him for misappropriating its property, it was also a waiver of its right to sue his sureties for the damages caused by such misappropriation. (*Pitts v. Congdon*, 2 N. Y. 352; *Chester v. Bank of Kingston*, 16 id. 336; *Bank of Albion v. Burns*, 46 id. 170; *Barnes v. Mott*, 64 id. 397; *Ludlow v. Simond*, 2 Cai. Cas. 1; *Colemard v. Lamb*, 15 Wend. 329; *Stevens v. Cooper*, 1 Johns. Ch. 425; Harris on Subrogation, § 17.)

It must be assumed on the facts found that the plaintiff had two causes of action against Rutherford, one on the note and the other for misappropriating the security collateral to the note. If they were concurrent, the defendants cannot complain, as both could be prosecuted until one or the other was satisfied. If they were necessarily inconsistent so that a judgment on one was a defense to the other, their liability on the bond ceased when the judgment was entered.

We think that the remedies were concurrent and not inconsistent. By indorsing the notes, not formally but, as it must now be assumed, with the intention of binding himself, Ruther-

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ford became liable to the plaintiff on his contract. Subsequently by misappropriating the security that he had taken and was holding as cashier for the plaintiff's benefit, he violated his fiduciary relation to the bank and made himself liable in tort. The latter cause of action accrued nearly five years after the former, to which it had only an accidental relation. His liability on the notes did not prevent him from wrongfully disposing of the bank's collateral and making himself liable on that account also. The casual circumstance that one payment would discharge both liabilities, does not affect their independent origin and nature, because no fact, essential to liability on the note, was essential to liability for the misappropriation. There was a breach of contract and also a breach of duty in no manner dependent on such contract. Under such circumstances, no election of remedies was required, for both were available. (*Manning v. Keenan*, 73 N. Y. 45, 51; *Morgan v. Skidmore*, 3 Abb. [N. C.] 92; *Morgan v. Powers*, 66 Barb. 45; *White v. Whiting*, 8 Daly, 23, 25; 6 Am. & Eng. Encyc. of Law, p. 248.)

It may be that the error of the learned trial judge in his legal conclusion that Rutherford was not liable as indorser, affected his finding of the fact that Rutherford held the stock as cashier for the benefit of the bank. We find no exception to the facts as found that is specific enough to raise this point. While said conclusion of law was wrong, it did not constitute reversible error, because the final result reached in the judgment ordered was right.

We think that the judgment should be affirmed, with costs. All concur, except BROWN, J., not voting.

Judgment affirmed.

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JAY WICKS, as Treasurer, etc., Respondent, v. EDWARD H. MONIHAN et al., Appellants.

No person, corporation or association, authorized to acquire and hold property, can be divested of it by the fiat of any other organization, or in any way without its consent, unless by due process of law.

An unincorporated association of seven or more members, organized as a local assembly of the organization known as "Knights of Labor," is not divested of title to property, contributed and owned by the associated members, by an annulment of its charter, and cannot be deprived thereof by any decree of the General Assembly.

After a local assembly is thus deprived of its charter, an action may be maintained by its president or treasurer to recover an indebtedness due the association. (Code Civ. Pro. § 1919.)

The distinction between such a case and that where a member of a club or voluntary association, in which the rights of the individual members are fixed by contract, has been expelled for violation of rules, pointed out. Reported below, 54 Hun, 614.

(Argued October 26, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 10, 1889, which affirmed a judgment in favor of the plaintiff, entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward J. Meegan for appellants. The referee erred in holding as a matter of law that the plaintiff was the real party in interest, and could maintain this action as treasurer of Local Assembly No. 4119 of the Knights of Labor. (*McFadden v. Murphy*, 149 Mass. 341; *Altmann v. Benz*, 27 N. J. Eq. 331; *Schmidt v. Gunther*, 5 Daly, 452; *Belton v. Hatch*, 109 N. Y. 598; *Hyde v. Woods*, 94 U. S. 523.) District Assembly No. 126, to which Local Assembly No. 4119 was attached, brought an appeal to the General Assembly, but before it could be heard this action was brought. Local Assembly No. 4119 might also have appealed, but it did not. This action was premature. Remedies provided for in the constitution should

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first be exhausted. (*Lafond v. Deems*, 81 N. Y. 514; *Burns v. B. Union*, 24 Abb. [N. C.] 150.) The legal effect of the unreversed action of the general executive board was to deprive the plaintiff and his associates as Knights of Labor of the title to the note in suit. (*White v. Brownell*, 4 Abb. Pr. [N. S.] 194; *Grosvenor v. United, etc.*, 118 Mass. 78; *Brine v. Bd. of Trade*, 2 Am. Law Reg. 268; *Thompson v. Adams*, 7 Wkly. Notes, 281; *Elsas v. Alfred*, 1 C. C. Rep. 123, 124; *Hirschl on Societies*, 63; *Lloyd v. Loaring*, 8 Ves. 773; *Hyde v. Woods*, 2 Saw. 655; 94 U. S. 523; *Poultney v. Bachman*, 31 Hun, 49; *McKane v. Adams*, 51 id. 629; *White v. Brownell*, 2 Daly, 329; *People v. Young Men's, etc.*, 65 Barb. 357; *Snow v. Wheeler*, 113 Mass. 179; *Chamberlain v. Lincoln*, 129 id. 70; *Altman v. Benz*, 27 N. J. Eq. 331; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Hall v. Supreme Lodge*, 24 Fed. Rep. 450; *Robinson v. Yates City Lodge*, 86 Ill. 598; *Karcher v. Supreme Lodge*, 137 Mass. 368; *Sperry's Appeal*, 116 Penn. St. 391.)

Charles S. Nisbet for respondent. The action was properly brought by the plaintiff as treasurer of an unincorporated association of seven or more persons. (Code Civ. Pro. § 1919; *Tibbetts v. Blood*, 21 Barb. 650; *Poultney v. Bachman*, 10 Abb. [N. C.] 254; 4 id. 300, and note; 39 N. Y. S. R. 941; 74 id. 234.) It was not necessary that the note be indorsed by the other payees, Perry, Ryland and Silber, trustees. It was the property of the association. (Edwards on Bills and Notes [2d ed.] 287; *Billings v. Jane*, 11 Barb. 620; *Clement v. Adams*, 12 How. Pr. 163; *Van Riper v. Baldwin*, 19 Hun, 344.) The referee properly excluded a conversation on the street between the defendant Stack and some one not named, in reference to the defendants' liability to pay the note. It was an attempt to vary or contradict the terms of the note by parol evidence. (*S. & L. Bank v. Camp*, 21 How. Pr. 443; *Potter v. Tallman*, 35 Barb. 182; *Erwin v. Sanders*, 1 Cow. 249; *F. N. Bank v. Tisdale*, 18 Hun, 151.) The contention of the defendants that the plaintiff ought to have appealed

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from the order of suspension to some superior body in the organization is not well taken. (*Lafond v. Deems*, 81 N. Y. 507; *Poultney v. Bachman*, 31 Hun, 49.) Even though the laws of the order of the Knights of Labor provide that the title to the property of an assembly suspended for insubordination vested elsewhere, still the courts would not enforce such provisions, the plaintiff and his association not having assented thereto. (*Austin v. Searing*, 16 N. Y. 112.)

FOLLETT, Ch. J. This action was begun August 1, 1887, to recover the amount due on the following note:

“\$500. AMSTERDAM, N. Y. Nov. 23rd, 1886.

“Six months after date we promise to pay to the order of William Perry, William Ryland, John Silber, trustees, and Jay Wicks, treasurer, five hundred dollars at the First National Bank of Amsterdam, value received with three per cent use.

“E. H. MONIHAN,
“JOHN C. STACK.”

It is conceded that the note was given for money owned by the society and loaned to the defendants, and that no part of it has been paid.

The defenses interposed were: (1) That the note was given for money advanced and used to sustain a strike, upon the agreement that it was not to be paid if the strike failed, and that it did fail; (2) That the plaintiff, as treasurer could not maintain the action; (3) That Local Assembly No. 4119 since the note was given has been dissolved by a decree of the General Assembly of the Knights of Labor of America and all of the property of the former had become vested in the latter.

The defendants testified that the money was advanced to promote a strike, upon the agreement that it was not to be paid in case the strike failed, and that it did fail. This was denied by the plaintiff's treasurer, who made the loan, and this issue of fact was determined by the referee in favor of the plaintiff.

The referee found that Local Assembly No. 4119 was, when the note was given, and when the action was brought and

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tried, an unincorporated association consisting of seven or more persons; and if these facts were well found the action was properly brought in the name of the treasurer. (Code Civ. Pro. § 1919.)

It is conceded that when the note was given and when this action was tried an unincorporated voluntary association with more than seven members existed at Amsterdam under the name of Local Assembly No. 4119 of the Knights of Labor. While the existence of the association is not denied, it is urged as a defense that the associated persons had, before this action was begun, ceased to be a Local Assembly of the Knights of Labor by reason of a decree of the General Assembly, of the order of Knights of Labor of America which assumed to annul the charter of Local Assembly No. 4119 and directed that all of its property should be turned over to the secretary of the General Assembly.

There exists in America a voluntary unincorporated association of persons known as the Knights of Labor having a written constitution, sections 1 and 2 of art. 1 of which provide: "§ 1. This body shall be known as the General Assembly of the Knights of Labor of America, and shall be composed of representatives or alternates, selected according to art. 2 of this constitution."

"§ 2. This General Assembly has full and final jurisdiction and is the highest tribunal of the order of the Knights of Labor. It alone possesses the power and authority to make, amend or repeal the fundamental and general laws and regulations of the order; to finally decide all controversies arising in the order; to issue all charters to the state, district and local assemblies." * * * How the "representatives or alternates" composing the General Assembly are selected does not appear, as the second article of the constitution is not given. The constitution also provides: "A District Assembly shall be composed of duly accredited delegates from at least five Local Assemblies," but how they are selected is not disclosed. It does appear that the organizations known as Local Assemblies are the units of the society, and that they are connected in

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some manner not shown by the record, with District Assemblies, and that both Local and District Assemblies are attached and owe allegiance to the General Assembly. It does not appear from the record that any contractual relations ever existed between the District and Local associations; or between them, or either of them and the General Assembly. This case was defended on the theory that the General Assembly possessed, and could rightfully exercise autocratic governmental powers over all subordinate branches of the society; and that it could, by its order, without a hearing, expel from the organization any Local or District Assembly, and by that act become entitled to all the property of the assembly whose charter should be revoked.

In August, 1886, more than seven residents of Amsterdam, after having effected a preliminary organization, were chartered under the name of Local Assembly No. 4119 of the Knights of Labor by the General Assembly of Knights of Labor of America, and was attached to District Assembly No. 126. The District and Local Assembly continued attached to the General Assembly until May 26, 1887, when the charter of District Assembly No. 126 and the charters of all of the Local Assemblies attached thereto (including No. 4119) were revoked and annulled for disobedience of the orders of the General Assembly, and the master workmen of the District and Local Assemblies were directed to deliver their property to the general secretary of the General Assembly, pursuant to section 1 of article 5 of the Constitution of the General Assembly, which provides:

“Art. 5, § 1. It shall be the duty of the district recording secretary to collect and take charge of the charter, seals, books, money and other property of any Locals attached to the District Assembly that may lapse, and shall give receipt to the officer of the Local surrendering the same.”

Local Assembly No. 4119 declined to surrender its property, including the note in suit, to the general secretary, but continued its local organization and retained possession of its property in defiance of the order of the General Assembly.

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It is asserted that the order of the General Assembly *ipso facto* divested the Local Assembly of its title to the note in suit as well as to all other property held by it. This contention cannot be sustained on principle or authority. The precise question was determined in *Austin v. Searing* (16 N. Y. 112), which arose over the title of Cayuga Lodge No. 80 of the Independent Order of Odd Fellows to certain property in its possession. In that case, as in this, there was a supreme tribunal called the Grand Lodge of the Independent Order of Odd Fellows, in the United States of America, and, like the Knights of Labor, it had district organizations. By the constitution of the Odd Fellows, the Grand Lodge of the district had power to revoke the charters of all local lodges, and when revoked, to take possession of their property. The charter of Cayuga Lodge No. 80 was revoked for an alleged act of insubordination and a decree confiscating its property was promulgated. Nevertheless, the members of the lodge refused to surrender their property, but retained possession of it. Afterwards, a new lodge was chartered at Auburn by the Grand Lodge of the United States and given the same name and number as the old lodge, but composed of different persons from those associated as members of the first lodge. By the charter granted to the new lodge, all of the property which the Grand Lodge claimed to have acquired title to by confiscation was in form transferred to the new lodge. An action was brought by the persons associated and represented by the new lodge against the persons associated and represented by the old lodge for the recovery of the property in the possession of the old lodge. It was held that the provision in the constitution of the order giving the Grand Lodge power to confiscate the property of subordinate lodges, could not be enforced in the courts, and that the decree of the Grand Lodge revoking the charter of the insubordinate local lodge, did not divest it of its property, and that the plaintiff could not recover. This judgment has remained unquestioned for more than a third of a century, and is the law of this state to-day.

As before stated, this case was not tried upon a theory that

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the organizations which constitute the order of Knights of Labor are bound together by any contract, or that Local Assembly No. 4119 had contracted with the General Assembly that, under certain circumstances, its property should be transferred to and become that of the General Assembly; but upon the theory that the General Assembly was vested with governmental powers, and could by its edicts divest the title of any District or Local Assembly to its property and vest it in itself without a hearing. This position cannot be sustained. The property of Local Assembly No. 4119 was not derived from the General Assembly, but was contributed and owned by the associated members of No. 4119, and held by an absolute title as perfect and unconditional, so far as is shown by the case, as is the title by which any person or corporation holds its individual property. To hold that the General Assembly can by a decree divest the title to property and vest it in itself, is giving to it a power which is forbidden to be exercised by congress, or by the legislature of any state. Bills confiscating the property of citizens, or of associations, without judicial process, are forbidden by the Constitution; and no person, corporation or association authorized to acquire and hold property, can be divested of it by the fiat of any organization, nor in any way without its consent, or by due process of law.

This case is quite different from those arising over the expulsion of members from clubs and voluntary associations for violation of rules. In those cases, the rights of the individual members are fixed by contract, and it is held that a member may be expelled by the association for violating the terms of the compact, provided, however, that due notice of the proposed action, and an opportunity for defense be given.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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PETER LAWYER, Respondent, v. PETER G. FRITCHER, Appellant.

One who interferes with another's right to the service of a third person, whether male or female, a minor or adult, is liable for actual or compensatory damages, in the same manner and upon the same grounds that he would be liable for an unlawful interference with any other property right of another.

Where the consent of a parent, entitled to and who is receiving the services of a daughter, to dispense with such services is obtained by fraud, it is void, and furnishes no defense to an action by the parent against the perpetrator of the fraud for damages resulting from the loss of service. In such a case where loss of service was shown, and it appeared that the daughter after being taken away from her father's house, was seduced by the defendant, *held*, that the jury had the right in their discretion to impose punitive as well as compensatory damages.

In an action by a father to recover damages sustained by the unwarranted interference of defendant with plaintiff's right to the services of his daughter, the following facts appeared: Plaintiff's daughter, who was seventeen years of age, generally lived and performed services in her father's family. Defendant, who was a married man, fraudulently representing to plaintiff that he had a legal right to marry, obtained from plaintiff and his wife a consent in writing to his marriage to their daughter. Defendant then took her away from home, seduced her and, after cohabiting with her two nights, she, on discovering that his statement was false, took poison and died. *Held*, that plaintiff was entitled to maintain the action for the unlawful interference with plaintiff's right to the services of his daughter; and that the jury had a right, in their discretion, to impose punitive damages.

Reported below, 54 Hun, 586.

(Argued October 27, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 11, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the material facts are stated in the opinion.

F. R. Gilbert for appellant. Plaintiff was guilty of contributory negligence and cannot recover. (*Segar v. Slingerland*, 2 Caines, 219; *Travis v. Barger*, 24 Barb. 614; *Smith*

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v. *Martin*, 15 Wend. 270; *Rarnett v. Greathead*, 49 Barb. 106; 2 Greenl. on Ev. § 578.) The court erred in admitting testimony showing a promise of marriage existing between the parties. (*Foster v. Scoffield*, 1 Johns. 297; *Gillet v. Mead*, 7 Wend. 193; *Brownell v. McEwen*, 5 Den. 367; 26 Barb. 617; 2 Abb. [N. S.] 388.) There was no legal evidence upon which to base a verdict, and the plaintiff ought to have been nonsuited. (*Dain v. Wycoff*, 7 N. Y. 191; *Bartley v. Richtmyer*, 4 id. 38; *Mulvehall v. Millward*, 11 id. 343; *Morrison v. N. Y. & N. H. R. R. Co.*, 32 Barb. 568; *Robinson v. McManus*, 4 Lans. 386; *Alger v. Gardner*, 54 N. Y. 360; *Knight v. Wilcox*, 14 id. 415; *Ingersoll v. Miller*, 47 Barb. 47; *Hogan v. Cregan*, 6 Robt. 138; *White v. Nellis*, 31 N. Y. 405; *Bagley v. Bove*, 105 id. 171.)

Wm. C. Lamont for respondent. If the paper consenting to the marriage of Edith with defendant was procured by false and fraudulent representations, then it was no consent and entirely unavailing. It left defendant in the same situation as if he had, secretly and by force, in the night time, taken plaintiff's daughter from her home. (*People v. DeLeon*, 13 N. Y. S. R. 588.) Plaintiff made out a good cause of action. (*Lipe v. Eisenlord*, 32 N. Y. 229; *Lawrence v. Spencer*, 90 id. 669.) This action can be maintained without pregnancy or disease. (*White v. Nellis*, 31 N. Y. 405, 408; 31 Barb. 279; 47 id. 47; 44 id. 589; *Lipe v. Eisenlord*, 32 N. Y. 236; 2 Sedg. on Dam. [7th ed.] 312; *Manville v. Thompson*, 2 C. & P. 303; *Hewitt v. Prime*, 21 Wend. 79; *Furman v. Van Sise*, 56 N. Y. 441.) No error was committed on the trial, of which defendant can complain. The doctor had no right to testify to and receive statements from Edith Lawyer. (Code Civ. Pro. § 834; 80 N. Y. 295; 24 Hun, 43.)

POTTER, J. This action was brought by plaintiff against defendant to recover damages, as alleged in the complaint, for the abduction of plaintiff's infant daughter from the service of the plaintiff, her father, and also for seduction while she was

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absent from her father's house. It appears that the defendant, who is a man sixty years of age and has a wife from whom he is not legally divorced, and who is living absent from him, on the 6th of May, 1886, came to the plaintiff's house and had an interview with the plaintiff, as well as his daughter.

On the sixteenth day of May following he again came to the plaintiff's house and had an interview with him and plaintiff's wife upon the subject of marrying Edith, plaintiff's daughter. During the interview with the plaintiff upon the latter day upon the subject of the marriage of defendant to plaintiff's daughter, there was a conversation between them in regard to his legal right to contract marriage, and whether the conditions of separation of defendant from his wife were such as to allow of a valid marriage between defendant and plaintiff's daughter. The defendant represented that he had a legal right to marry, and the defendant drew a consent or contract to carry out such design, and induced the plaintiff and his wife to sign it. The consent or contract was in these words:

"To Home it May Concern: We the undersigned are the father and mother of the bearer Edith Lawyer, Whereas Edith and P. J. Fritcher of Sharon wish to be united we give our consent to their contracts.

"RICHMONDVILLE, *May* 16, 1886.

"PETER LAWYER

"CATHERINE LAWYER."

Said Catherine Lawyer was not able to write her name, and Edith was requested to sign her name for her and did so. After these representations were made and this instrument signed, the defendant carried Edith to Portlandville, in Otsego county, a distance of about thirty miles from her home and residence of plaintiff; staid at a public house at that place, and said to the lady who kept the house that he was married; occupied the same bed with Edith on the night of the seventeenth. The next day defendant carried Edith to Sharon, Schoharie county, where he resided, and stated to his housekeeper, who was a sister of Edith, that she was his

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wife. On the night of the eighteenth of May the defendant and Edith occupied the same room and the same bed. After Edith arrived there, and during the eighteenth and nineteenth days of May, there was a conversation between Edith and Julia, her sister, defendant's housekeeper, in which Julia told Edith that the defendant could not marry; that he had a wife living and was not divorced from her.

Edith, the plaintiff's daughter, was about 17 years of age, generally lived in her father's family, and performed service for him, though she did work out occasionally, but her father had received her wages.

Among the declarations made at the interview of the sixteenth between plaintiff and defendant, the plaintiff testifies that the defendant said: "I am just as clear from my wife as though I never had married her." The plaintiff also testified that he believed such statement to be true. This statement and belief preceded the signing of the paper above set forth.

On the seventeenth or eighteenth day of May, and after defendant had arrived at his home and made the statements above to Julia, she procured from a drug store in the vicinity of defendant's residence some poison. Edith partook of that poison and died of it on the twentieth day of May.

The principal question involved in this case is whether the plaintiff proved a loss of service and damage in consequence thereof sufficient to maintain the action. The trial judge charged the jury that the plaintiff was not entitled to recover damages for any loss of service by reason of the taking of the poison and the death of Edith in consequence. Nevertheless, the jury, under the charge of the court, found a verdict in favor of the plaintiff of \$800, besides costs.

The General Term was not unanimous in affirming the judgment on the verdict of the jury. One of the learned judges, as shown by his dissenting opinion, uses the following language, which indicates the view taken by him and the grounds for his dissent from the affirmance of the judgment: "The defendant, a married man, over 60 years of age, took plaintiff's daughter Edith about seventeen years old, from her

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father's house, on Monday, May seventeenth. He did this with the consent of the parents; but the verdict of the jury establishes that he obtained this consent by fraud. That night he stayed with her at a hotel and occupied the same bed with her, saying to the landlady that Edith was his wife. * * * The next day, after dinner, Edith became sick. She had taken poison. The day following, Thursday the twentieth, she died from the effects of the poison. Before death she told her sister that she took poison because she did not want to live and that she did not want to see anybody. There was evidence that Edith had recovered from her usual monthly courses a week before she went away with defendant, and that before her death her underclothes were spotted with blood, which a physician supposed to be the menstrual flow. The important point in this case is whether on these facts the court could properly submit to the jury the question whether the plaintiff sustained damage other than that of death, for loss of service by reason of the seduction. It will be seen that there is no evidence of seduction before Monday night; no evidence of Edith's condition from Monday night till Wednesday noon, when she took the poison, and, of course, no evidence of pregnancy."

I should not feel justified in departing from my rule in this court not to write an opinion upon the affirmance of a judgment in a common and ordinary case, except to reconcile differences of opinions by the judges of the court below and to remove any resort to strained or doubtful reasoning to sustain the judgment appealed from, by a brief presentation of a feature of the case that was not distinctly brought out in that court.

This action was brought to recover damages which the plaintiff alleged he has sustained by the unwarranted interference of the defendant with plaintiff's right to service. It is as well settled that he who unlawfully interferes with another's right of service, whether it be the service of a male or female, a minor or an adult, is liable for actual or compensatory damages in the same manner and upon the same grounds

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that he would be liable for an unlawful interference with any other property right of another.

The plaintiff alleges that he is the father of Edith Lawyer, that at the time of the acts of the defendant complained of by the plaintiff, she was seventeen years of age and was residing with the plaintiff, and that he was entitled to her services, and that without the consent of the plaintiff, the defendant on or about the 16th day of May, 1886, enticed and persuaded the said Edith Lawyer to leave the residence and service of the plaintiff and to accompany him (the defendant) to Portlandville, in the county of Otsego, etc.

The plaintiff also alleged that on the 17th day of May, 1886, the defendant debauched the said Edith, etc.

The evidence in this case establishes beyond question that on and previous to the 16th day of May, 1886, Edith was the servant of plaintiff both in law and fact. It follows from that relation that plaintiff was entitled to command and to have her services wholly and without interruption, save such time as was necessary for her rest, health and preservation, until the plaintiff should give a valid consent to dispense with the service or the law should terminate the relation.

The defendant came to plaintiff's house, where she was in fact performing and was in law bound to perform services for the plaintiff, and took her from and deprived the plaintiff of such service.

If this was done, as plaintiff alleges, without his consent, the defendant is liable to make plaintiff compensation for the loss of service. If the plaintiff's consent was obtained by defendant through fraud, it was void, for fraud vitiates all contracts and all consents. Consent or no consent was one of the issues to be tried by the jury, and the jury has found upon competent evidence for that purpose that any consent given by plaintiff was given through fraud and so was no consent. With this finding by the jury the court cannot interfere. Edith was taken away from the plaintiff by the defendant and remained with him at a hotel, and on the way to defendant's home and at his home for the space of four days, and the plaintiff was in the

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meantime deprived of her services and his right to them was unlawfully interfered with.

The gravamen of the action and of all actions of this nature is the loss of service, *and both the pleadings* and the proofs in this case make out a cause of action in entire harmony with the fullest requirements of such actions and entirely dispense with any necessity or occasion to resort to *fiction* as is said to be done in some instances to maintain the recovery of damages in these cases.

In the aspect we have been considering this case, it presents an actual and measurable pecuniary damage to the plaintiff. The loss of service constitutes the cause of action and it can make no difference as to the right of action whether that has been accomplished by an unlawful persuasion of the servant to leave the master's employment or through fraud upon the master or force upon the servant, or by both such fraud and force.

The loss of service is the cause of action and when that is established, a basis for damages to some extent exists, and whether that loss is caused or attended or followed by sexual intercourse, defilement or pregnancy, loss of health or disability to serve, or for the purpose or with the intention of obtaining those results through a formal but criminal marriage, has relation more especially to the damages the plaintiff may recover than to his cause of action.

It is true the complaint charged debauchment and ill health as a consequence, as well as the taking of the servant from the master. Whether the debauchment was proven or not, the taking away by the defendant was proven without any contradiction and this gave plaintiff a cause of action and a right to damages. In such cases the jury have the right to impose punitive damages in their discretion in addition to compensatory damages.

I think these views are abundantly supported by numerous decided cases, to a few of which I make reference and extracts. Judge ANDREWS in *People v. DeLeon* (109 N. Y. 229), says: "In *Regina v. Hopkins* (Car. & M. 254), the case of an

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indictment for the abduction of an unmarried girl under sixteen years of age 'against the will' of her father, it appearing that the consent of the parents was induced by fraud, the indictment was sustained and GURNEY, B., said (in that case) 'I mention these cases to show that the law has long considered fraud and violence to be the same.' "

In *Lipe v. Eisenlord* (32 N. Y. 233), (which was an action by the father to recover damages for the seduction of his daughter who was 29 years of age but living in her father's family) this language is used, "and any illegal act by which the right of the father, such as it was, to her services was interfered with to his detriment, was a legal wrong for which the law affords redress."

On page 236 of the same case the court uses this language: "Finally it is urged by defendant's counsel that only compensatory damages should have been allowed. The judge refused so to direct the jury and I think he was right. The object of the action in theory is to recover compensation for the loss of the services of the person seduced. This is so far adhered to that there must be a loss of that kind, or the action will fail; but when that point is established, the rule of damages is a departure from the system upon which the action is allowed. The loss of service is often merely nominal, though the damages which are recovered are very large. It is too late to complain of this as a departure from principle, for it has been the law of this state and of the English courts for a great many years."

The same court, further on in the opinion, uses this language: "The true rule (this being an action brought by plaintiff for the seduction of his daughter) I think is that the plaintiff's right to the services may be made out in either way, and that when established so that the action is technically maintainable, the court and jury are to consider whether the plaintiff, on the record, is so connected with the party seduced as to be capable of receiving injury through her dishonor. A mere master, having no capacity to be injured beyond the pecuniary worth of the services lost, should undoubtedly be

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limited in his recovery to the value of these services. But the case of this plaintiff, as has been mentioned, is quite different."

In *Hewitt v. Prime* (21 Wend. 79-81-82), Judge NELSON, in delivering the opinion of the court in an action like the one under consideration, uses this language: "It is now fully settled, both in England and here (citing several authorities in both countries), that acts of service by the daughter are not necessary; it is enough if the parent has a right to command them, to sustain the action. * * * The ground of the action has often been considered technical, and the loss of service spoken of as a fiction, even before the courts ventured to place the action upon the mere right to claim the services; they frequently admitted the most trifling and valueless acts as sufficient."

Further on in the opinion, the judge uses this language: "The action, then, being fully sustained, in my judgment, by proof of the act of seduction in the particular case, all the complicated circumstances that followed come in by way of aggravating the damages."

In *White v. Nellis* (31 N. Y. 405-407-409), (which was an action for debauching plaintiff's minor daughter, and communicating to her a venereal disease by which she was made sick and unable to labor), the judge uses the following language: "Whenever the wrongful act, by immediate and direct consequences, deprives the master of the service of his servant, or injuriously affects his legal right to such service, the law gives a remedy. It is not sufficient to sustain the action to prove the seduction merely. That is the wrongful act from which it must appear that a direct injury to the relative rights of the master has followed. The right of the master, as recognized by the law, is to have the services of the servant undisturbed by the wrongful act of another. * * * In cases of debauchery, the ordinary consequences that affect the master are the pregnancy and lying-in of the servant, during which she is unable to render him service. Hence the precedents of pleadings in this form of action have perhaps invariably alleged a loss of service through those consequences. But it

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by no means follows that there is no remedy where the loss of service is the direct effect of the wrongful act, although produced by some other consequence. All that the law can require is *damnum et injuria*, for these constitute, when directly connected, the proper and complete elements of an action on the case. And whenever they combine as an immediate cause and effect, the law cannot deny a remedy without a departure from principle.

“It is maintainable because a wrongful act has caused a direct injury to a lawful right. In such case, the right of the master to a remedy for an injury to his enjoyment of the services of his servant is equally clear, whether it be produced by beating and wounding the servant, or enticing him from employment, or forcibly abducting him, or wrongfully debauching and impregnating with child or with disease. Nor, in my judgment, does the remedy depend upon the sex of the servant. * * * We have now to determine the abstract right to maintain any action at all; and that is something quite independent of the question what damages may be recovered if the action be allowed.”

In the case of *Ingerson v. Miller* (47 Barb. 47, 50), the General Term use this language: “It is no objection to the maintenance of the action that no expense or actual loss of service is proved. It is sufficient that the father was at the time entitled to the services of the daughter, and might have required them had he chosen to do so.” “The master has a property in the labor of his servant, and any wrongful act creating or producing a disability in the servant to perform what the master has a right to require, operates as a disturbance or infringement of such right to which the law will attach at least nominal damages as a result of the injury.” “But proof of the slightest loss of service or the most trifling injury, if the direct result of the wrongful act, is sufficient to uphold the action.”

In *Badgley v. Decker* (44 Barb. 588), the opinion of the court at General Term holds this language: “There was evidence in this case sufficient to go to the jury upon the ques-

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tion of the relation of master and servant existing between the plaintiff and her daughter. The slightest degree of service has been holden sufficient to maintain the action and to allow a recovery for the heaviest damages, * * * but to accommodate the action to cases where the daughter rendered no service, a presumed or a fictitious service is resorted to as the gravamen."

The judgment should be affirmed, with costs.

All concur, except PARKER, J., not sitting.

Judgment affirmed.

THE POCANTICO WATER WORKS COMPANY, Respondent, v.
SETH BIRD et al., Appellants.

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155	27

The legislature may vest a private person or corporation with the right of eminent domain, when the use to be made thereof is to acquire property for the public benefit.

In order to make the use public, a duty must devolve upon the person or corporation to furnish the public with the use intended. This use may be limited to the inhabitants of a small or restricted locality, but it must be to those inhabitants in common, and not for a particular individual. The question of public use is a judicial one, and must be determined by the courts.

Plaintiff, a water works company, organized under the act providing for the incorporation of such companies (Chap. 737, Laws of 1873, as amended by Chap. 415, Laws of 1876), located and constructed a dam and reservoir upon the P. river, and in May, 1886, filed a map showing the location and the lands necessary to be taken, and entered into contracts with several villages to supply them with water. It had, prior to May, 1888, acquired the lands occupied by it, and the right to divert the water of the stream from the riparian owners below the dam, except one H., and had commenced proceedings to acquire his rights. On April 9, 1888, the company adopted a map and plans for two additional reservoirs, which were not contemplated at the time of filing the original map, one to be located on lands acquired by it below the land of H., which map was filed May 7, 1888. It had also acquired the rights from the riparian owners below H. to divert the water at such lower reservoir. Before this, however, but while plaintiff was prosecuting with diligence and in good faith the proceedings to acquire the rights of H., defendants, who composed the board of water commissioners of the village of T., with actual notice of what plaintiff had done, undertook to locate a dam and reservoir upon the lands of H., filed a map thereof and

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instituted proceedings to condemn for their use the riparian rights of H. In an action to restrain defendants from constructing such dam and reservoir, *held*, that neither plaintiff's original plan, as shown by the map then filed, nor the rights acquired from the riparian owners below, deprived defendants of the right to locate their works upon the same stream below defendants' works; that the fact that defendants succeeded in filing their map before the plaintiff filed its second map, did not necessarily give defendants the exclusive right to condemn and acquire the lower riparian rights; that plaintiff, before filing that map, had the right to enter upon and acquire the lands and water rights required for the additional reservoir, and that the rights so acquired were not impaired by the filing of defendants' map; nor did that act give to them the right to acquire by condemnation proceedings plaintiff's rights in the stream below; and as their proposed dam and reservoir would interfere with those rights, plaintiff was entitled to the relief sought.

Plaintiff, in its contracts with the riparian owners, contracted to supply them with water. It was claimed on the part of defendants that the rights so acquired were not for, and had not been devoted to, the public use, and were not necessary for the purposes of plaintiff's incorporation. *Held*, untenable; that the agreement to supply individuals with water did not destroy the public use, and that the facts justified a finding that said rights were necessary for the purposes of plaintiff's incorporation; that is, to meet the requirements, under all contingencies, of the villages dependent upon it for their water supply.

The judgment below restrained defendants from constructing and maintaining any reservoir and dam upon the P. river, or from intercepting or diverting any of its waters, or from acquiring any riparian rights therein. *Held*, error, and judgment modified so as only to restrain defendants from erecting any reservoir or dam above the point where plaintiff had located its new reservoir.

(Argued October 27, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 25, 1889, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The judgment below "enjoined and restrained from constructing, erecting or maintaining any dam or dams, reservoir or reservoirs, upon the Pocantico river, a stream in the town of Ossining and Mount Pleasant, county of Westchester, or any of its tributaries for any of the defendants' purposes; and from intercepting, diverting, appropriating or using any of the

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waters of said river or its tributaries for the supplying of any village, or its inhabitants, with water therefrom; and from proceeding further to condemn any of the riparian rights in said river, or its tributaries, and from in any wise acting in relation thereto, or interfering with the plaintiff, the Pocantico Water Works Company, in the possession or use of said stream and its tributaries; and it is further ordered, adjudged and decreed that the board of water commissioners of the village of Tarrytown, N. Y., its servants, or agents, or any of them, be and they hereby are perpetually enjoined and restrained from doing any or all of the acts or things hereinabove set forth."

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry C. Griffin for appellants. The property in question is not required by plaintiff for a public use. (*In re N. F. & W. R. R. Co.*, 108 N. Y. 75; *In re S. R. C. R. Co.*, 128 id. 408; *In re R. W. Co.*, 66 id. 413, 418; *Embury v. Conner*, 3 id. 511, 516; *Taylor v. Porter*, 4 Hill, 140; *Jenkins v. Anderson*, 103 Mass. 94; *Curtiss v. Whipple*, 23 Wis. 350; *In re Belfast Academy*, 11 Me. 109; Cooley on Const. Lim. 469; Laws of 1885, chap. 422; Lewis on Em. Domain, §§ 164, 165; *Varner v. Masten*, 21 W. Va. 534; *In re N. Y., L. & W. R. R. Co.*, 99 N. Y. 12; *People ex rel. v. Forrest*, 97 id. 100; Laws of 1873, chap. 737, § 3; *Garwood v. N. Y. C. & H. R. R. R. Co.*, 83 N. Y. 400, 406, 407; *Colrick v. Swinburne*, 105 id. 503, 506, 507; *In re Albany Street*, 11 Wend. 150, 151; *In re Cherry Street*, 19 id. 667; *In re S. B. R. R. Co.*, 119 N. Y. 141; *R. & S. R. R. Co. v. Davis*, 43 id. 137.) The plaintiff has not complied with the statute in order to acquire the title it claims as a public corporation to riparian rights below its dam. (*Garwood v. N. Y. C. & H. R. R. R. Co.*, 83 N. Y. 400; Laws of 1885, chap. 423, § 4; *Marshall v. Peters*, 12 How. Pr. 118; 2 Washb. on Real Prop. [3d ed.] 320, 321, 328, 329, §§ 40, 42; *Elliott v. F. R. R. Co.*, 10 Cush. 193; *Stokoe v. Singer*, 8 El. & Bl. 36; *Wads-*

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worth v. Tillotson, 15 Conn. 366; *Tyler v. Wilkinson*, 4 Mass. 397; *People ex rel. v. Diver*, 19 Hun, 264; *Dodge v. Berry*, 26 id. 246, 248.) Plaintiff cannot succeed in this action, unless it shows the exclusive right on the 21st day of April, 1888, to condemn the property defendants are seeking to acquire. (*In re P. B. Co.*, 108 N. Y. 483, 490, 491; *In re R. E. Co.*, 33 N. Y. S. R. 695, 701; *In re A. W. Comrs.*, 96 N. Y. 351, 358; *People v. B. F. & C. I. R. R. Co.*, 98 id. 75.) The plaintiff, having filed a map as the statute requires, exhausted its power of choice, and the location so made was final. (*In re P. Bridge Co.*, 108 N. Y. 483; *H. & D. C. Co. v. N. Y. E. R. R. Co.*, 9 Paige, 323.) Assuming that the word "land" as used in section 2, chapter 415, Laws of 1876, does not include water rights, or riparian rights or the right to divert streams, it does not help plaintiff. (*In re Poughkeepsie Bridge*, 108 N. Y. 483.) This action will not lie because the same questions can be litigated at law in the proceeding instituted by defendants to condemn, where plaintiff is a party. (*In re R. W. Co.*, 66 N. Y. 418; *In re C. R. R. v. Gas Co.*, 63 id. 326; *In re N. Y., L. & W. R. R. Co.*, 99 id. 12; Story's Eq. Juris. § 875; 1 Johns. Ch. 611; *R. H. & L. R. R. Co. v. N. Y., L. E. & W. R. R. Co.*, 44 Hun, 211; 110 N. Y. 134.) The village of Tarrytown is a necessary party; in fact the only party interested in this litigation. (*People ex rel. v. Dwyer*, 27 Hun, 548; *Appleton v. Water Comrs.*, 2 Hill, 433; *Grover v. Swain*, 29 Hun, 454; *Davis v. Mayor, etc.*, 1 Duer. 451; *Mayor, etc., v. Starin*, 106 N. Y. 1.) By statute the defendants can condemn and take any of the property rights or interests owned or held by the plaintiff. (Laws of 1875, chap. 181, § 22; Laws of 1876, chap. 415, § 5; *S. A. R. R. Co. v. Kerr*, 72 N. Y. 330.)

E. T. Lovatt for respondent. Plaintiff has duly filed its maps, as required by law, to acquire the riparian rights on the Pocantico river. (Laws of 1873, chap. 737, § 3; Laws of 1876, chap. 415.) The plaintiff is the owner of all the riparian rights in said stream, by purchase prior to April

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21, 1888. (*Jackson v. Fish*, 10 Johns. 455; *Jackson v. Blodgett*, 16 id. 172; *Jewett v. Jewett*, 16 Barb. 150; *Lynch v. Livingston*, 6 N. Y. 422; *King v. Mayor, etc.*, 102 N. Y. 171.) Plaintiff has used due diligence and acted in good faith in endeavoring to purchase, settle for and acquire all riparian claims on said streams, and particularly with the said George Hart. (*R. H. & L. R. R. Co. v. N. Y., L. E. & W. R. R. Co.*, 44 Hun, 209; 110 N. Y. 128.) Plaintiff has a prior lien upon the Pocantico river and its tributaries, and the right to perfect its title thereto, and the same are necessary for the purposes of the plaintiff. (110 N. Y. 361.) Defendants have no right to locate its dam and water system where they propose to locate the same for the purpose of diverting the Pocantico river, and the two streams which flow into the Pocantico river. (46 Hun, 525; 66 N. Y. 418; *R. H. & L. R. R. Co. v. N. Y., L. E. & W. R. R. Co.*, 110 id. 128; *P. P. & C. I. R. R. Co. v. Williamson*, 91 id. 552.) In an action in equity for preventive remedy, such relief only will be granted as the nature of the case and the facts as they exist at the close of the litigation demand. (*Peck v. Goodberlette*, 28 Wkly. Dig. 553; 22 id. 536.) In equity actions the court will always look at the entire case, and see whether substantial justice has been done; and where that appears, it will affirm the judgment, notwithstanding the admission of testimony which in ordinary actions at law might have necessitated a new trial. (*Platt v. Platt*, 2 T. & C. 26; *Church v. Kidd*, 3 Hun, 254; 15 Abb. [N. C.] 107.) This action was properly brought against these defendants, as they are the persons authorized by statute to do any and all acts relative to supplying a village with water. (Laws of 1875, chap. 181; Laws of 1885, chap. 170, 211; *B. R. R. Co. v. Furey*, 4 Abb. [N. S.] 365.)

HAIGHT, J. This action was brought to restrain the defendants, who were acting as the board of water commissioners of Tarrytown, from locating and constructing a dam and reservoir upon the premises of one George Hart on the Pocantico river,

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at a point between the plaintiff's dam and its contemplated storage reservoir.

The plaintiff was organized under chapter 737 of the Laws of 1873, as subsequently amended, and had entered into contracts with the villages of North Tarrytown, Dobbs Ferry and Hastings to supply them with pure and wholesome water. It had located its works upon the Pocantico river, and had constructed a dam and reservoir a short distance above the premises owned by Hart, on which the defendants sought to locate their works. It had acquired by contract, purchase or proceedings to condemn, the lands occupied by it, and the right to divert the water, from most of the riparian owners below the dam, and as the court finds, was proceeding with due diligence and in good faith to acquire the riparian rights of Hart; that the defendants, with actual notice of all that the plaintiff had done to secure Hart's rights in the stream, undertook to locate a dam and reservoir on Hart's land, by which they proposed to take the waters of two of the tributaries of the Pocantico river to supply the village of Tarrytown with water, and on April 21, 1888, filed a map thereof and instituted proceedings to condemn for their use the riparian rights of Hart.

It further appears that on the 29th of May, 1886, the plaintiff caused to be filed in the office of the clerk of the county a map showing the location of the dam and reservoir which have been constructed, and of the lands necessary to be taken therefor; that on April 9, 1888, at a meeting of the company, it was resolved that the maps prepared by the engineer of the company showing the location of lands required for the high service reservoir with the rights of way thereto to be erected by the company on the Baylies property and also the storage reservoir located below the present one to be erected on Phelps and Rice property, be adopted, and the president and secretary directed to sign the same and attach the corporate seal of the company thereto according to law, and cause the same to be filed in the county clerk's office. The map so adopted and approved was filed in the office of the

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clerk on the 7th day of May, 1888, but not until after the defendant had filed its map.

It is quite apparent that it was not within the contemplation of the plaintiff at the time of the filing of its original map in 1886, to construct the high service reservoir or the storage reservoir. The dam and reservoir as it now exists, with the property necessary to be taken therefor, with the necessary pipe lines therefrom, is all that was covered by that map. It is true that the lower riparian owners upon the stream were entitled to damages by reason of the diversion of the water of the stream at the plaintiff's dam and reservoir. It was the duty of the plaintiff to settle with such owners for the damage so occasioned them, but we do not understand that this would deprive the defendant or any other company of the right to locate its works upon the same stream below the plaintiff's works. The plaintiff by its dam and reservoir only could divert the water of the stream at that place. All of the overflow or surplus, together with that which entered from tributaries below the dam, would continue on down the natural bed of the stream and this surplus was available for the use of other companies. But it is claimed on behalf of the plaintiff that it had found it necessary to also appropriate this surplus as well as that coming to the river from the tributaries below the dam, and that this appropriation was finally determined upon at the meeting of the company on April ninth; that in order to carry out the enterprise, it had acquired the lands necessary for the new storage reservoir with the right to divert the water of the river thereat instead of the dam above, and that all of the rights of the riparian owners between the company's dam and its proposed storage reservoir had been acquired, with the exception of that belonging to Hart, and that it was proceeding with due diligence to acquire his interests when the defendants, with full knowledge of the plaintiff's purposes and plans, filed their map and instituted their proceedings to condemn.

It is under these circumstances that the plaintiff seeks to enjoin the defendant.

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As to the river below the plaintiff's dam, the defendants succeeded in filing its map before the plaintiff, but we do not regard this act as necessarily giving the defendants exclusive right to condemn and acquire the lower riparian rights in the river.

We are aware that in the case of *Rochester, Hornellsville & Lackawanna Railroad Company v. New York, Lake Erie & Western Railroad Company* (110 N. Y. 128), it was held that where a railroad corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made as the result of any proceeding by any land owner or occupant, it has thereby acquired a right to construct and operate its road upon such line, exclusive in that respect as to all other roads or corporations.

But in the case of a railroad, the statute provides for the location of its route through the counties which it has to pass, and such location is made known by the map and survey which it places on file. The statute then, within a specified time, gives to the persons interested the right to institute proceedings to change the location. If this is not done, the road becomes located at the place indicated upon the map filed, and the company is thus given the exclusive right to construct and operate its road upon such line. But no such provision is embraced in the statute giving to water works companies the right to locate their dam or reservoir.

The provisions of that act, as amended by chapter 415 of the Laws of 1876, provides that after the company shall have fully completed its organization, and shall have made a contract with any town or village, as provided in the act, to supply the same with pure and wholesome water, the company and its agents and employes shall be authorized to enter upon any land or water for the purpose of making surveys and to agree with the owner of the property which may be required for the purposes of the act, as to the amount of compensation to be paid such owner; but before entering, taking or using any

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land for such purposes, the company shall cause a survey and map to be made of the lands intended to be taken or entered upon, on which the land of each owner or occupant shall be designated, which map shall be signed by the president of the company and its secretary, and filed in the office of the county clerk.

It will be observed that under the provisions of this statute the map is to be filed before the company enters upon the land for the purpose of using it. But it may enter upon the lands for the purpose of making surveys and acquiring title by agreement with the owner before such map is filed; and that is what it appears had been done by the plaintiff in this case.

Phelps granted unto the plaintiff "the full right and privilege to forever divert the waters of the Pocantico river from my premises, situate, lying and being in the town of Mt. Pleasant, county of Westchester and state of New York, and use the same for all its purposes."

Beatty granted unto the plaintiff, "its successors or assigns, the full right and privilege to forever divert the waters of the Pocantico river from my premises in said town, county and state, and use the same for all its purposes."

Harriet Horton granted "all my riparian rights in and to said Pocantico river, and hereby sell and assign the same riparian rights to said Pocantico Water Works Company, for myself, heirs, executors, administrators and assigns."

Carle granted to the plaintiff, "its successors or assigns, the full right and privilege to forever divert the waters of Pocantico river from my premises, situate, lying and being in the town of Mt. Pleasant, county of Westchester and state of New York, and use the same for all its purposes."

Rockefeller granted unto the plaintiff "all my right, title and interest, and claim of, in and to the water of the Pocantico river, and release all damages for the diversion thereof on or along my premises by said company for the purposes for which it was chartered."

Rice conveyed lands to the plaintiff which embraced the bed of the stream and carried with it the riparian rights of the grantor.

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Other lands were acquired by purchase and proceedings to condemn which we do not deem it necessary to mention in detail.

We have called attention to the lands lying between the company's dam and its proposed storage reservoir, all of which had been acquired by the plaintiff, with the exception of Hart's, prior to the time that the defendants filed their map, and in each grant the right was given to the plaintiff to divert the water running in the stream at the premises. This would include all of the overflow from the company's dam as well as all of the water which should enter the stream from the tributaries below the dam and above the premises so acquired.

Hart's property is located upon the river above the premises mentioned as having been acquired by the plaintiff. If the defendants are permitted to locate their dam and reservoir upon the Hart property it will cut off the water which otherwise would naturally flow through the river. They would consequently have to acquire from the plaintiff its rights to the water flowing through the premises mentioned. This they claim the right to do by proceedings to condemn, and for that purpose their map was filed.

In view of the fact that the statute gave to the plaintiff the right to acquire land and water rights by agreement with the owners before filing its map, we do not think that its rights acquired by such agreement were impaired by reason of the filing of defendants' map.

It is claimed, however, that these rights acquired by the plaintiff were not for the public use, had not been so devoted, and that they were not necessary for the purposes of its incorporation.

The term "public use," as used in connection with the right of eminent domain, is not easily defined. The legislature has no power to take the property of one individual and pass it over to another, unless the use to which it is to be applied is for the public benefit. The question of public use is a judicial one and must be determined by the courts. It is not affected by the agency employed, for it may be vested in private per-

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sons, who may be actuated solely by motives of private gain, if the use to be made thereof is for the benefit of the public. It has consequently been held that railroads, canals, turnpikes, ferries, sewers, gas and water companies are for a public use, and the legislature may give them the right to take the real estate necessary for their use under the right of eminent domain. It is doubtless true that in order to make the use public a duty must devolve upon the persons or corporation holding the property to furnish the public with the use intended. The term implies "the use of many," or "by the public," but it may be limited to the inhabitants of a small or restricted locality, but the use must be in common and not for a particular individual. (Lewis on Eminent Domain, chapter 7; *Olmstead v. Proprietors of the Morris Aqueduct*, 46 N. J. Law, 495; *Inhabitants of Wayland v. County Commissioners of Middlesex*, 4 Gray, 500; *St. Helena Water Company v. Forbes*, 62 California, 182; *In the Matter of the Application of the New Rochelle Water Company*, 46 Hun, 525; *Stamford Water Company v. Stanley*, 39 id. 424.)

The statute under which the plaintiff was incorporated gives the right of eminent domain after the completion of the organization of the company and its contract with the town or village to supply the inhabitants thereof with pure and wholesome water. The contract does not of itself make the use public, but it does impose upon the plaintiff a duty to supply the villages with whom the contract was made with water. It being with villages in which the inhabitants thereof have the right to its common use, it becomes public within the rule uniformly recognized by the courts.

But it is said that the plaintiff has entered into contracts with Rockefeller, Horton, Legate and others, persons of whom the plaintiff has secured its water rights, to supply them, their cattle, etc., with necessary water. Very true. It also may engage with every householder in the village of North Tarrytown to supply them with water. This would not destroy the public use. It would rather tend to show use by many, and thus establish that the use was for the public benefit. With

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the persons named there are special contracts, but those contracts were made for the purpose of securing their riparian rights.

It is true that the rights of the plaintiff, acquired below its dam, have not as yet been devoted to a public use, but at the time this action was commenced it had not had time to complete the structures necessary therefor; that it was proceeding in good faith and with due diligence, was a fact found by the trial court.

The property must be necessary for the purposes of the incorporation. This fact has also been found by the trial court, and when we take into consideration that the inhabitants of three villages are dependent upon the supply which the plaintiff is able to furnish, our changeable seasons and the liability to long droughts, we are not disposed to interfere with such finding, but rather to adopt the language in the case of *Olmsted v. Proprietors of the Morris Aqueduct* (47 N. J. Law, 311): "It is impossible to estimate with precision the quantity of water that will be needed to supply the wants of the population of * * *. Nor can it be computed with accuracy what the supply of water will be from the district hitherto relied upon. In a matter of such extreme necessity, all contingencies must be provided for, and the supply should be so ample that a lack of water could not be reasonably apprehended. A supply to that extent is necessary to enable the company to perform its duty to its consumers."

We do not deem discussion necessary as to the other questions raised.

The judgment should be modified so as to only enjoin the defendants from constructing, erecting or maintaining any dam or reservoir upon the Pocantico river above the point where the plaintiff has located its storage reservoir, and as so modified the judgment should be affirmed, with costs.

All concur.

Judgment accordingly.

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SARAH M. GERARD et al., Respondents, v. JAMES McCORMICK,
Appellant.

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f164	286
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While to entitle a principal to recover money wrongfully paid by his agent upon a debt of the latter, he must show that the creditor knew that the agent was acting in violation of his authority, knowledge that the money was held by him as agent is sufficient to establish this *prima facie*, as the legal presumption is that an agent has no authority to dispose of the property of his principal in payment of his own debt. One, therefore, who receives such payment, with knowledge that the money was held by his debtor as agent, does so at his peril, and to defeat a recovery must show authority in the agent to so dispose of the money. B., as the agent of plaintiffs, had charge of certain premises known as "Glass Buildings;" he deposited the rents collected to the credit of a bank account kept in his name as "Agent Glass Buildings." In payment of a debt which B. owed defendant, as collateral for which the latter held certain securities, he received a check on the bank signed by B., with the words "Agt. Glass Buildings" following his signature, and on receipt surrendered the securities. The check was paid by the bank and charged to said account. B. had no authority to so use the fund. In an action to recover the amount thereof, there was no evidence tending to raise any question as to defendant's good faith, except such receipt of the check. *Held*, that the form of the check was sufficient to indicate to defendant the existence of an agency, and to put him on inquiry as to the agent's authority to so use the money; and so, that a refusal to nonsuit and a submission of the case to the jury, was proper.

(Argued October 29, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city of New York, entered upon an order made February 19, 1890, which affirmed a judgment in favor of plaintiffs entered upon a verdict and affirmed an order denying a motion for a new trial.

The action was brought to recover \$501.25, money received by the defendant September 19, 1882, alleged to belong to the plaintiffs.

For many years, the plaintiffs have owned Nos. 87 and 89 Wall street, New York, known as "Glass Buildings." From 1872 to February, 1887, William Boswell was the agent of the plaintiffs, having authority to collect and deposit the sums

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received for rents in the Corn Exchange Bank to the credit of an account kept in the name of "William Boswell, Agent Glass Buildings," and to draw therefrom sums due for repairs, insurance, taxes, interest on incumbrances, his own commissions and for the usual expenses of such buildings, and then to divide, by checks on the account, the remainder among the plaintiffs according to their respective interests. The checks drawn against this account were signed "William Boswell, Agt. Glass Buildings."

August 31, 1882, William Boswell borrowed \$500 of the defendant upon securities deposited as collateral, and on the 19th of September, 1882, he paid the loan amounting, with interest, to \$501.25, by the following check:

"No. NEW YORK, *Sept. 19th*, 1882.

"CORN EXCHANGE BANK:

"Pay to the order of James McCormick, Five hundred and one 25 Dollars.

"\$501.25.

WILLIAM BOSWELL,

"*Agt. Glass Buildings.*"

Upon receiving the check, the defendant surrendered to Boswell the collateral pledged as security for the loan, and thereupon the check was thus indorsed:

"James McCormick,

"For Deposit

"to the credit of James McCormick & Co.,

"per JOHN C. FINK, *Atty.*"

Thereafter the check was paid by the Corn Exchange Bank pursuant to the above order indorsed thereon, and charged to the account of "William Boswell, Agt. Glass Buildings."

In 1887, the plaintiffs learned that Boswell had, from time to time, appropriated large sums of money arising from the rents to his own use. The appropriations were made by drawing checks for his own benefit, like the one given to the defendant, and by neglecting to keep down the taxes and interest, which he reported to the owners as paid. After Boswell's frauds were discovered, this action was begun September

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5, 1888, to recover from the defendant the sum received by him by this check. The defenses interposed were: (1) That the money secured by means of it did not belong to the plaintiffs; (2) That the defendant received it for value, in good faith, and without notice of the plaintiffs' rights, if any they had.

When the plaintiffs rested, and again at the close of the evidence, the defendant asked the court to dismiss the complaint on the grounds, among others, that the evidence was insufficient to authorize the jury to find that the money received belonged to the plaintiffs, and was insufficient to authorize them to find that the defendant had knowledge that the check was drawn against money belonging to the plaintiffs. The motion was denied and an exception taken. The questions were submitted to the jury under instructions which are not contained in the case, and must have been satisfactory to both parties. A verdict was found for the plaintiffs on which a judgment was entered, which was affirmed by the General Term, and from that judgment the defendant appealed to this court.

Samuel Fleischman for appellant. The action being one for money had and received, it was essential that plaintiff, in order to recover, should prove that the defendant received money belonging to plaintiffs. This plaintiffs utterly failed to do. (*DePeyster v. Winter*, 4 How. Pr. 449; *N. T. Co. v. Gleason*, 77 N. Y. 403; *Chapman v. Forbes*, 123 id. 536; *Decker v. Salzman*, 59 id. 277; *Supervisors, etc., v. Sisson*, 24 Wend. 387.) To enable a principal to recover his money paid by his agent in discharge of the latter's debt, the former must show that the defendant knew that the agent had no right thus to use the money. (*Ford v. U. N. Bank*, 88 N. Y. 672; 25 Hun, 64; Story on Agency, §§ 227, 228; *Justh v. N. Bank*, 56 N. Y. 478; *Lamback v. Liebert*, 87 Penn. St. 55; *Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 195; *Griswold v. Haven*, 25 id. 595; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id. 30, 58, 68; *Armour v. M. C. R. R. Co.*, 65 id. 111; *N. R. Bank v. Aymer*, 3 Hill, 262;

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Amidon v. Wheeler, Id. 137; *LeBritton v. Pierce*, 2 Allen, 8; *L. R. Bank v. Plimpton*, 17 Pick. 158; *Clement v. Leverett*, 12 N. H. 317.) The words "Agt. Glass Building," added to Boswell's name, were but *descriptio personæ*, and defendant had a right to regard the check as Boswell's individual check. (*De Witt v. Walton*, 5 Seld. 571; *Pentz v. Stanton*, 10 Wend. 271; *Reznor v. Wood*, 36 How. Pr. 353; *Hills v. Bannister*, 8 Cow. 32; *Taaft v. Brewster*, 9 Johns. 333.) The defendant having given up security upon receipt of the check was a purchaser for value. (*Bank of Salina v. Babcock*, 21 Wend. 499; *M. Bank v. Corey*, 1 Hill, 513; *Bank of Sandusky v. Schoville*, 24 Wend. 115; *Meads v. M. Bank*, 25 N. Y. 143.) Plaintiffs are estopped from recovering from defendant by reason of their delay in prosecuting the claim. (*Justh v. N. Bank*, 56 N. Y. 478.) This action, being for money had and received, is in the nature of an equitable action; and plaintiffs can only recover by showing that they are *ex æquo et bono* entitled to the money. (*Eddy v. Smith*, 13 Wend. 490; *K. Bank v. Eltinge*, 66 N. Y. 625.)

H. Kettell for respondents. A deposit made by a depositor as agent is *prima facie* the property of the principal. (*Arnold v. M. S. Bank*, 71 Penn. St. 287.) The signature to the check was sufficient notice to defendant to put him on inquiry. (*Carpenter v. Farnsworth*, 106 Mass. 561; *Wright v. Cabot*, 89 N. Y. 574; *Budd v. Munroe*, 18 Hun, 316; *Pendleton v. Fay*, 2 Paige, 202; *Anderson v. Alen*, 12 Johns. 343; *M. Bank v. Livingston*, 74 N. Y. 223; *Moore v. A. L. & T. Co.*, 115 id. 65; *Stevens v. Board of Education*, 79 id. 187; *Argersinger v. McNaughton*, 24 N. Y. S. R. 16.) The words of the signature after the name were not merely descriptive of the person. (*Fellows v. Longyear*, 91 N. Y. 331; *Sutherland v. Carr*, 85 id. 110; *N. Bank v. Ins. Co.*, 104 U. S. 517.) The defendant being the one whose acts made the occurrence possible, must bear the loss and is liable to the plaintiffs. (*Wright v. Cabot*, 89 N. Y. 574; *G. Bank v. S. Bank*, 17 Mass. 43; *Root v. French*, 13 Wend. 572; *Sanford v. Handy*,

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23 id. 268; *Argersinger v. McNaughton*, 24 N. Y. S. R. 20.) To bind a principal the authority of the agent must be proved, and it is incumbent on defendant to show that Boswell had authority to borrow money. (*Snook v. Lord*, 56 N. Y. 605; *Marvin v. Wilber*, 52 id. 270; *Eaton v. D., L. & W. R. R. Co.*, 57 id. 390; *H. S. M. Co. v. Farrington*, 82 id. 127; *Budd v. Monroe*, 18 Hun, 317; *Griswold v. Haven*, 25 N. Y. 599; *O'Laughlin v. Hammond*, 21 N. Y. S. R. 647; *Briggs v. Davis*, 20 N. Y. 15; 16 id. 134; *Swarthout v. Curtis*, 5 id. 301; *Moore v. L. & T. Co.*, 115 id. 65.) Defendant was bound to inquire into the authority of Boswell and must be presumed to know the limitations of the agent's authority. (*Crane v. Evans*, 1 N. Y. S. R. 217; *Argersinger v. McNaughton*, 24 id. 16.) Trust funds can always be recovered, unless against a *bona fide* purchaser for consideration without notice. (*Weaver v. Barden*, 49 N. Y. 286; *Wetmore v. Porter*, 92 id. 81; 91 id. 324; *Van Allen v. A. N. Bank*, 52 id. 1; *Stephens v. Board of Education*, 79 id. 186; *Smith v. Bank of Commonwealth*, 56 id. 478-484; *Pierson v. McCurdy*, 33 Hun, 530; 100 N. Y. 608; *James v. Cowing*, 82 id. 449; *Folkland v. S. N. Bank*, 84 id. 145; *Baker v. N. E. Bank*, 19 Abb. [N. C.] 458; *A. N. Bank v. F. N. Bank*, 46 N. Y. 82; *N. Bank v. Ins. Co.*, 104 U. S. 517; *Duncan v. Jaudon*, 15 Wall. 175; *Shaw v. Spencer*, 100 Mass. 389.)

FOLLETT, Ch. J. The evidence was abundant to authorize the jury to find that the amount standing to the credit of "William Boswell, Agt. Glass Buildings," in the Corn Exchange Bank belonged to the plaintiffs, and that by means of the check the sum represented by it was, by the fraud of Boswell, withdrawn from the account and paid to and received by the defendant.

The remaining question is whether the evidence authorized the court to submit to the jury the question of good faith, or was sufficient to authorize the jury to find that the defendant had notice that the check was drawn against an account not owned by Boswell.

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The defendant testified, and his evidence was not disputed, that he received the check from Boswell in payment of \$500, loaned August 31, 1882, and at the same time surrendered securities pledged as collateral to the loan. He was a holder of the check and of the money received by it, for value. The defendant also testified that he took the check in good faith, and there is nothing in the case which tends to raise any question about his personal good faith except that he received a check from Boswell in payment of his individual debt, signed "William Boswell, Agt. Glass Buildings," without inquiry as to the right of Boswell to so use the fund. The learned counsel for the appellants cites *Ford v. Union National Bank* (13 N. Y. W. Dig. 352; aff'd, 88 N. Y. 672), as decisive of the case at bar. That case arose out of the following facts: An account was kept by "C. F. Norton, Agt.," with the defendant bank, whose cashier knew that it belonged to some principal whose name was to him unknown, for whom Norton was acting as agent, Norton being indebted to the bank, drew his check signed "C. F. Norton, Agt.," in its favor on this account for \$1,000. The check was charged to the account and the sum represented by it applied on Norton's debt. When Norton's principal learned of this misappropriation he sued the bank and recovered a judgment for the sum on a trial before the court without a jury, which was reversed by the General Term and a new trial granted. On an appeal from the order it was affirmed by the Court of Appeals, without an opinion and without making any reference to the opinion of the court below. (88 N. Y. 672.) The learned General Term correctly stated the abstract rule: "That to entitle a principal to recover his money wrongfully paid by his agent upon the agent's debt, the person receiving the money must have known that the agent was acting in violation of his authority." But the court overlooked the rule that a person who knowingly receives the money or property of a principal from an agent in payment of the latter's debt, does so at his peril; and if the agent acted without authority, the principal may, on proof of these facts, recover his money. (*National Bank v. Insurance Company*, 104 U. S.

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54, and the cases there cited; *Wright v. Cabot*, 89 N. Y. 570; *Baker v. N. Y. National Exchange Bank*, 16 Abb. [N. C.] 458.) Story states the rule as follows: "Thus, a person dealing with a factor or broker is bound to know that, by law, a factor or broker, although a general agent, is not clothed with authority to pledge, deposit or transfer the property of his principal for his own debt; and if he receives such a deposit or pledge, the title is invalid, and the property may be reclaimed by the principal." (Story's Agency, § 225.) The affirmance of the order by the Court of Appeals in *Ford's* case, there being exceptions in the record, cannot be regarded as an approval of the opinion of the General Term, as applied to the facts of that case.

It is a legal though a rebuttable presumption, that one who holds money or property as agent, trustee, executor, administrator, guardian or partner, has no authority to dispose of it in payment of his own debt.

This brings us to the question whether the form of the check was sufficient to put the defendant upon inquiry as to the authority of Boswell to use the money in payment of his debt.

A certificate for shares of stock running to "A. B., trustee," or to "A. B. in trust," without disclosing the names of the beneficiaries or the particulars of the trust, is notice to a purchaser of the shares that "A. B." does not hold them in his own right, but as a trustee. (*Sturtevant v. Jaques*, 96 Mass. [14 Allen] 523; *Shaw v. Spencer*, 100 Mass. 382; *Budd v. Munroe*, 18 Hun, 316; *Gaston v. American Exchange Natl. Bank*, 29 N. J. Eq. 98; *Perry on Trusts*, §§ 225, 814; *Lowell Trans. Stock*, § 69; *Mor. Corp.* [2d ed.] §§ 181-184; *Cook S. & S.* § 325.) In *Fellows v. Longyor* (91 N. Y. 331), it was said: "The words 'guardian, etc.,' in the securities in question operated as notice to the defendant Longyor of the rights of the wards, of whom Downer was guardian." In California it is held that a certificate for shares running to "A. B., trustee," without disclosing the beneficiaries, or the particulars of the trust, is not sufficient to put a proposed pur-

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chaser upon inquiry. (*Brewster v. Sime*, 42 Cal. 139; *Thompson v. Toland*, 48 id. 99.) The two cases last cited are not in accordance with the current of authority, and do not, as we think, lay down a rule best adapted to protect the interests of owners, as well as dealers in such securities. The check gave the defendant notice that William Boswell did not assume to be the beneficial owner of the account against which he drew, but that he held it as agent, and also as agent for the Glass Buildings. Had he signed as agent for Sarah M. Gerard and others, owners of "Glass Buildings," the efficiency of the notice that the drawer of the check was not the owner of the fund against which it was drawn, could not be questioned under any well-considered authority. We think that the form of the signature to the check was sufficient to put the payee on inquiry as to the right of the agent to pay his personal debt out of the fund. The buildings and the bank were both well known, were in the same city and very near to the place where the check was received by the defendant, and had an inquiry been made at the bank or at the buildings, it would have been ascertained that the account was held by William Boswell, not as owner, but as agent for these plaintiffs.

In case a person having notice that money or property is held by another in a fiduciary capacity, receives it without inquiry from the agent, in satisfaction of his personal debt, the sum or property so received may be recovered by the true owner, unless the agent was authorized to so dispose of it. The court did not err in refusing to nonsuit, or in submitting the case to the jury.

None of the exceptions to the admission or exclusion of evidence require consideration.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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THOMAS DOLLARD, Respondent, v. EDWARD ROBERTS,
Appellant.

In an action to recover damages for loss of service, etc., of the plaintiff's minor daughter and the expense of medical attendance as the result of injuries to her from the falling of plaster from the ceiling of a hallway on the ground floor in a tenement-house owned by defendant, an upper floor of which was leased to and occupied by plaintiff with his family, which hallway was used in common by the tenants, the following facts appeared: Some time prior to the injury water had leaked through the plaster at the place where it fell, and the attention of H., from whom plaintiff rented and who collected the rents and attended to the repairs, had been called to the condition of the ceiling and to the danger that the plaster would fall, and he promised to have it repaired, but had failed to do so. *Held*, that defendant owed to his tenants the duty of exercising reasonable care in keeping the hallway in suitable repair and condition for their use; that the knowledge of H. as to the condition of the ceiling was, as between plaintiff and defendant, sufficient to charge the latter with notice; that it was a question for the jury whether the falling of the plaster was reasonably to be apprehended, and so as to whether defendant was chargeable with negligence.

Also *held*, the fact that plaintiff and his daughter had knowledge of the condition of the ceiling and may have apprehended that the plaster would fall, did not necessarily charge either of them with contributory negligence in passing under it; that while the duty was imposed upon her of using due care to avoid danger, it could not be said as matter of law that she failed in that respect by not constantly having in mind the condition of the ceiling when passing through the hallway, as she was obliged to do in going to and fro.

At the time of the injuries plaintiff's daughter was between thirteen and fourteen years of age, and was accustomed to perform services in doing housework. Defendant's counsel asked the court to charge the jury that if plaintiff failed to prove the value of the time lost or facts on which an estimate of such value could be founded, only nominal damages for that item could be given. This request was refused, and the court charged that if the jury found plaintiff was entitled to recover, he was entitled to recover not only for loss of service, the result of the injury, up to the time of trial, but also for prospective loss during the child's minority, and also for expenses actually and necessarily incurred, or which would be immediately necessary in consequence of the injury in the care and cure of the child. *Held*, no error.

(Argued October 20, 1891; decided December 1, 1891.)

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APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 10, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for the loss of service of the plaintiff's minor daughter resulting from a personal injury to her by the falling upon her of plaster from the ceiling of the hallway of a tenement-house fronting on East One Hundred and Fourth street in the city of New York, and for the expense of medical attendance on account of such injury. The defendant was the owner of the building and the occupants were his tenants. The plaintiff, with his family, occupied apartments on the top floor, and below that were two floors, also occupied by families, and the next below, the ground floor, was used as a drug store. The hallway on the ground floor was common to all the occupants of the three floors above it, and was their only means of access to their apartments from the street and of passage into it from them. On August 26, 1884, when passing along in this hallway plaintiff's daughter was struck on the head by plaster falling from the ceiling, eleven feet in height, and in that manner received the injury by which the alleged disability was produced.

Further facts are stated in the opinion.

Jacob F. Miller for appellant. The obligation of a landlord to repair demised premises rests solely upon express contract, and a covenant to repair will not be implied, nor will an express covenant be enlarged by construction. There are no implied covenants in a lease, except as to quiet enjoyment, which "has reference to the title and not to the quality or condition of the property." (*Witty v. Matthews*, 52 N. Y. 512; *Mumford v. Brown*, 6 Cow. 475; *Arden v. Pullen*, 10 M. & W. 821; Taylor's Landl. & Ten. [7th ed.] 327; *Ahern v. Steele*, 115 N. Y. 209, 220; *Franklin v. Brown*, 118 id. 115; *Clancy v. Byrne*, 56 id. 129; *Jaffe v. Harteau*, Id. 398; *Swords v. Edgar*, 59 id. 28, 33; Taylor's Landl. &

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Ten. [2d ed.] §§ 327-329; *Cleves v. Willoughby*, 7 Hill, 83; *Lockwood v. Horgan*, 58 id. 635; *O'Brien v. Capwell*, 59 Barb. 497, 504; *Lafflin v. B. & S. W. R. R. Co.*, 106 N. Y. 141; *Mayo v. Moller*, 1 Hill, 491; *Post v. Vetter*, 2 E. D. Smith, 248; *Wallace v. Lent*, 1 Daly, 481; *Noyer v. Miller*, 19 J. & S. 516; *Kabus v. Frost*, 50 id. 72.) Even where the landlord has covenanted to keep the premises in tenantable repair it is the duty of the tenant to notify him of the want of repairs, showing that the landlord, even in that case owes no active duty to the tenant to discover defects which render the premises untenable. Much less does he owe the tenant such a duty in the absence of any covenant at all upon the subject. (McAdam on Landl. & Ten. 451; *Wolcott v. Sullivan*, 6 Paige, 117.) If the interest which the plaintiff had in the hallway was that of a licensee, he took the premises as they were and cannot hold the defendant liable for damages resulting from their alleged defective condition. (Washb. on Real Prop. [5th ed.] 577; *Carstaus v. Taylor*, L. R. [6 Exch.] 217; *Anderson v. Oppenheimer*, L. R. [5 Q. B. Div.] 602; *Humphrey v. Wait*, 22 U. C. C. P. 580; *Purcell v. English*, 86 Ind. 34; *Ivay v. Hedges*, L. R. [9 Q. B. Div.] 80; *Burchell v. Hickisson*, 50 L. J. Q. B. 101; *Cusick v. Adams*, 23 N. Y. S. R. 548; *Reardon v. Thompson*, 21 N. E. Rep. 369; *Ahern v. Steele*, 118 N. Y. 209; *Donner v. Ogilvie*, 49 Hun, 229; *Gaffney v. Brown*, 150 Mass. 481; *Wilkinson v. Faurie*, 9 Jur. [N. S.] 280; 1 H. & C. 633.) Even if Hoyt promised to have the ceiling mended that would not bind the defendant, for he was not authorized to make such a promise. (*Marsh v. Chickering*, 101 N. Y. 396.) The defendant was guilty of no negligence toward the plaintiff or his daughter. (*Odell v. Solomon*, 99 N. Y. 637; *Wolf v. Kilpatrick*, 101 id. 152.) If the defendant was guilty of negligence, then the plaintiff and his daughter were also. (*Cahill v. Hilton*, 106 N. Y. 518; *Tucker v. N. Y. C. & H. R. R. Co.*, 124 id. 316.) The landlord is not liable in the absence of a statute enjoining the duty to keep the ceilings safe. (*Willy v. Mulledy*, 78 N. Y. 311; Laws of 1882, chap. 410, § 6; *Henckel v. Sheen*, 31

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Hun, 29.) Even if Hoyt promised and had power by promise to bind defendant, that did not relieve the plaintiff or his daughter from the duty to exercise care and keep out of the way of danger. (*Marsh v. Chickering*, 101 N. Y. 396; *Morrison v. E. R. Co.*, 56 id. 302; *Hunter v. C. & S. V. R. Co.*, 112 id. 377; 126 id. 22; *Kelly v. M. R. Co.*, 112 id. 451; *Martin v. Pettit*, 117 id. 123; *Hickey v. Taaffe*, 105 id. 26; *Bond v. Smith*, 113 id. 378; Laws of 1860, chap. 345.) The court erred in charging that the defendant is liable for injuries caused by the unsafe condition of the premises. (*Losee v. Buchanan*, 51 N. Y. 476; *Losee v. Clute*, Id. 494; *Tallman v. Murphy*, 110 id. 350; *Tucker v. N. Y. C. & H. R. R. Co.*, 124 id. 317; *Tunlin v. S. O. Co.*, 126 id. 524.) When premises are let, to which access can only be had over other property of the landlord, a way to the demised premises is implied. Hence the right to use the hallway passed to the plaintiff as tenant under the lease. (Willard on Real Estate, 194; *Holmes v. Seeley*, 19 Wend. 507; *N. Y. L. I. & T. Co. v. Milner*, 1 Barb. Ch. 353.) The rule of damages as laid down by the court was erroneous. (*Staale v. G. S. & N. R. R. Co.*, 107 N. Y. 625.)

Clifford A. H. Bartlett for respondent. The action is maintainable. (*Henkel v. Murr*, 31 Hun, 28; *Donohue v. Kendall*, 18 J. & S. 388; *Bold v. O'Brien*, 12 Daly, 163; *Spellman v. Bannigan*, 36 Hun, 176.)

BRADLEY, J. The alleged cause of action for loss of service and medical expenses was in the consequences of the injury to the plaintiff's daughter; and the liability of the defendant was dependent upon the fact that the injury was solely attributable to his negligent failure to perform a duty assumed by him in his relation of landlord to the plaintiff as his tenant. If the hallway had been part of the premises demised to the plaintiff, there would have been no liability of the defendant to him. But the argument of the defendant's counsel, founded upon the proposition that such was the relation of the parties

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to that portion of the building, does not seem to be applicable to the present case. It was a four-floor tenement-house. The apartments on the second, third and fourth floors were separately rented for use by families as dwelling places. The plaintiff had rented and, with his family, occupied the fourth or top floor, other families occupied the second and third, and on the ground floor was a drug store, and a hallway common to the occupants of the floors above. It was the means provided for their passage-way for ingress and egress into and from the building in going to and from the apartments from and into the street. It was essentially provided for that purpose, and necessarily common to the use of such occupants. Their right of passage through it was necessary to the availability for occupancy of the apartments rented by them. It was provided for their use in passing to and from the apartments demised to them, of which it constituted no part. It was, therefore, subject to their right of passage in it, under the control of the defendant, who was the owner and their landlord. And upon him was the duty of exercising reasonable care in keeping the hallway in suitable repair and condition for the use in safety by his tenants of apartments on the floors above it. (*Donohue v. Kendall*, 18 J. & S. 386; 98 N. Y. 635; *Palmer v. Dearing*, 93 id. 7; *Looney v. McLean*, 129 Mass. 33; *Lindsay v. Leighton*, 150 id. 285; *Peil v. Reinhart*, 127 N. Y. 381.)

The evidence permitted the conclusion of negligence of the defendant. For some time prior to the injury, water had been leaking through the plastered ceiling at the place from which the plaster fell and struck the girl. And the plaintiff, his wife and the daughter, testified that they had called the attention, to the condition of the ceiling at that place, of Mr. Hoyt, who collected the rents for the defendant and to whom the plaintiff was referred by the defendant when he sought to rent apartments in the building, and who also gave attention to the repairs made on it, and that Hoyt's attention was also called to the danger that the plastering would fall from the place so affected, and he said it would be repaired. Although

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there was some controversy about the relation of Hoyt to the defendant in respect to the business about the building, the conclusion was warranted that his knowledge of this condition of this ceiling, as between the plaintiff and the defendant, was such as to charge the latter with notice of it and with negligence for omission to repair it prior to the time of the injury, and it was a fair question for the jury whether the yielding and falling of the plaster was reasonably to be apprehended from the fact that water was leaking through and dropping from it as it did. The question of the defendant's negligence was properly submitted to the jury. The fact that the plaintiff and his daughter had been advised of the condition and may have apprehended that the plaster might fall from that place in the ceiling, did not necessarily charge them or the daughter with contributory negligence in passing under it at the time in question. While the duty was imposed upon her of using due care to avoid danger, it cannot, as matter of law, be said that she failed in that respect by not constantly having in mind the condition of the ceiling when passing through the hallway. This was her only passage-way into the street and from it in going to the apartment in which she dwelt. She had been out and was returning when the accident occurred. The impaired condition of the ceiling was not in the line of her vision as she proceeded through the hall, but to see it she would be required to look upward rather than forward. And as was said in *Palmer v. Dearing* (93 N. Y. 11): "It would be an extremely harsh rule which should require" her "who was called so often to pass this place to have kept her mind invariably fixed upon its character and to make her responsible for an omission to exercise incessant vigilance in passing" it. The girl was not necessarily chargeable with negligence for having for the time being forgotten the condition of the ceiling or for having her thoughts or attention diverted from it at the time of the occurrence. (*Weed v. Ballston Spa*, 76 N. Y. 329; *Bassett v. Fish*, 75 id. 303, 307.)

On this review all questions of fact arising upon a conflict of evidence must be deemed disposed of by the verdict; and

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in its support the plaintiff is entitled to the benefit of the inferences legitimately derivable from the evidence.

There was no error in the charge or refusal of the court to charge on the subject of damages for loss of service. It appeared that the daughter, who was then between thirteen and fourteen years of age, was accustomed to perform services in doing house-work. This question was for the jury, and the recovery of damages for loss of service is not in such cases limited to those sustained prior to the trial, but when the evidence justifies the conclusion that they will continue thereafter, prospective damages may be awarded. (*Drew v. Sixth Av. R. R. Co.*, 26 N. Y. 49; *Cuming v. Brooklyn City R. R. Co.*, 109 id. 95.)

The case was fairly submitted to the jury, and there was no error in any of the rulings to which exception was taken.

The judgment should be affirmed.

All concur.

Judgment affirmed.

THEODORE S. JENKINS, Respondent, v. WILLIAM E. DEAN,
Appellant.

In an action to recover for services rendered, the following facts appeared:

Defendant entered into a contract with the city of New York to construct certain sewers. Under said contract the city was authorized to retain, for six months after the work was done, a certain percentage of the contract price for the purpose of repairing the streets through which the sewers were constructed, which the city was authorized to expend only after defendant had, after being notified, refused to make such repairs. Defendant employed H., plaintiff's assignor, to superintend the work, agreeing to pay him for his services one-third of the net profits. The city made payments as the work progressed, and after its completion retained the percentage specified, which was paid to defendant in June, 1888. This action was commenced in January of that year. H. testified that he knew of the terms of defendant's contract with the city. Defendant moved to dismiss the complaint, at the close of plaintiff's evidence, on the ground that the action had been commenced before the contract was completed and before H.'s interest in the profits had become due. This motion was denied. *Held*, no error; that conceding

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it was not in the contemplation of the parties that the percentage of H. should become due and payable until the amount thereof could be ascertained, as the city was only authorized to expend for repairs the money retained, and the contractor could not be made liable for a larger sum, upon conclusion of the work, and upon payment of the amount earned less the amount retained, the parties could have determined the net profits and divided the same, leaving their interest, if any, in the amount retained, to be ascertained upon expiration of the six months.

Everson v. Powers (89 N. Y. 527), distinguished.

(Argued October 19, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 10, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

James Edward Graybill for appellant. The action was prematurely brought. (*Rogers v. Kneeland*, 10 Wend. 252; *Van Horne v. Crain*, 1 Paige, 455; *Hills v. Miller*, 3 id. 254; *Shaw v. Leavitt*, 3 Sandf. 163; *Peck v. Vandemark*, 99 N. Y. 34; 2 Pars. on Cont. 499; *Erwin v. Hoch*, 9 Cent. Rep. 678; *Thayer's Appeal*, 8 id. 479; *Van Nest v. Lott*, 16 Abb. Pr. 130; *Atkinson v. Collins*, 18 How. 235; *Ladue v. Seymour*, 24 Wend. 60; *Champlin v. Butler*, 18 Johns. 169; *Jewell v. Schroppel*, 4 Cow. 564; *Hare v. Vandusen*, 32 Barb. 92; *King v. Accum. Assn. Co.*, 3 C. B. [N. S.] 151; *Jackson v. McLean*, 96 N. C. 474; *McCullough v. Colby*, 4 Bosw. 603; *Wattson v. Thibou*, 17 Abb. 184; *Oothout v. Ballard*, 41 Barb. 33; *Smith v. Aylesworth*, 40 id. 104.) The complaint does not state facts sufficient to constitute a cause of action. (*Wheelock v. Lee*, 1 Abb. [N. C.] 85; *Emery v. Pease*, 20 N. Y. 64; *C. E. Ins. Co. v. Babcock*, 42 id. 647; *Tooker v. Arnoux*, 76 id. 400; *Munger v. Shannon*, 61 id. 260; *Bradley v. Aldrich*, 40 id. 509.) The court erred in admitting evidence to prove the cost of material not used in the work by the defendant. (*Gouge v. Roberts*, 53 N. Y. 619; *C. P. A. Co.*

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v. *Brown*, 5 J. & S. 433; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 554; *McCarragher v. Rogers*, 120 id. 533.)

William N. Dykman for respondent. The action is maintainable. (*Card v. Miller*, 1 Hun, 504; *Zimmerman v. Schoenfeldt*, 3 id. 692; *Seymour v. Cowing*, 1 Keyes, 532.) Dean's promise to pay on January 6, 1888, made that day the day of payment, and his refusal to perform his promise gave a complete cause of action. (*Peck v. Goodberlett*, 109 N. Y. 180; *Bartholomew v. Lyon*, 67 Barb. 86; *Leslie v. K. Ins. Co.*, 62 N. Y. 27.) The motion to dismiss the complaint upon the pleadings was properly denied. (*Smith v. Bodine*, 74 N. Y. 30.) It was not ground for dismissal of complaint that Kingsley was interested in the action. (*Sheridan v. Mayor, etc.*, 68 N. Y. 30.)

HAIGHT, J. This action was brought to recover pay for services rendered as defendant's superintendent.

It appears that on or about the 19th day of October, 1886, the defendant entered into a contract with the city of New York to construct sewers in Eighth and Eleventh avenues of said city. This contract contained a provision authorizing the city to retain for the period of six months after the work was performed a certain percentage of the contract price for the purpose of making repairs upon the streets through which the sewers were to be constructed. On the same day the defendant entered into a contract with the plaintiff's assignor, W. L. Holmes, to superintend the construction of the sewers, the defendant agreeing to furnish all moneys, tools and machinery necessary for the performance of the work, and for the use of the tools and machinery he was to receive a fair compensation and two-thirds of the net profits of the work. Holmes was to furnish his labor as superintendent, and work under instructions of the defendant, and in lieu of salary was to receive the other third of the net profits of the work for his services. The work of constructing the sewers commenced on the 27th of October, 1886, and continued about one year. Payments

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were made by the city on account of the work as it progressed from time to time, in accordance with the provisions of the contract. The amount of the percentage retained by the city after the work was completed amounted to the sum of \$1,773.12, which sum was finally paid to the defendant on the 29th of June, 1888.

This action was commenced on the 31st of January, 1888, and the claim is that it was prematurely brought.

Holmes, in his testimony, admitted that he knew of the provisions of defendant's contract with the city under which the work was to be performed, and that it authorized the city to retain a percentage of the contract price for the purpose of making such repairs as should thereafter be found necessary.

It will be observed that nothing was said in the agreement between Holmes and the defendant as to when his compensation should become due and payable. Under such contracts it would ordinarily become due when the work was completed, but in this case Holmes' compensation was to be one-third of the net profits of the work, and it appears that in making this agreement they had reference to the contract between the defendant and the city, and both should be construed together.

Under the agreement with the city the defendant was to be paid for the work as it progressed from time to time, the city reserving the stipulated percentage for repairs. It was doubtless within the contemplation of the parties that Holmes should at such times and in like manner be paid for his services.

It is claimed, however, that the compensation for his services could not become due and payable until such time as the net profits could be ascertained and determined; that such profits could not be ascertained until after the expiration of six months from the completion of the work, and until the amount that had been expended for repairs out of the percentage retained by the city could be determined. We must admit the force of this argument and concede that it could not have been within the contemplation of the parties that the money should become due and payable until the amount thereof could

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be ascertained, but upon reference to the agreement between the defendant and the city we find that the city is only authorized to expend for repairs the money retained, and that only after the contractor has had notice to make the repairs required and a failure so to do on his part. So that the contractor could not be made liable for a greater sum than that retained by the city. Upon the conclusion of the work, and upon the payment of the amount earned less the amount retained by the city, the parties could have then determined the net profits and divided the same in accordance with their agreement ; but their interest in the amount retained by the city could not have been ascertained until the expiration of the time provided for in the contract.

At the conclusion of the plaintiff's evidence the defendant moved for a dismissal of the complaint on the ground that the evidence showed that the action had been begun before the contract had been completed and before Holmes' one-third interest in the profits had become due. Exception was taken to the denial of this motion, and it now remains to be determined whether there was anything due upon the contract as we have construed it at the time the action was brought.

There appears to have been some discrepancy in the figures, but as taken by the trial court in his charge to the jury and then acquiesced in by the parties, neither taking exception thereto, they are as follows:

Plaintiff concedes he had been paid	\$234 00
Verdict	1,021 15
	<hr/>
Plaintiff's one-third of profits	\$1,255 15
Defendant's two-thirds	2,510 30
	<hr/>
Total net profits	\$3,765 45
	<hr/>
Total profits	\$4,008 46
Deduct total net profits	3,765 45
	<hr/>
Allowed by jury for use of tools	\$243 01
	<hr/>

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Amount of profits due and to become due when the action was brought.....	\$4,008 46
Value of the use of tools.....	\$243 01
Paid after action begun.....	1,773 12
	<hr/> 2,016 13
Amount of net profits on hand when the action was begun	\$1,992 33
One-third of which is.....	\$664 11
Less previously paid... ..	234 00
	<hr/>
Balance due.	<u>\$430 11</u>

This result would be changed in case the jury disallowed the two items amounting to \$407, but with those items disallowed there would still be a balance due.

It would consequently follow that a motion for a nonsuit was properly denied.

The jury, however, were permitted to find under the charge of the court the amount of the plaintiff's interest in the \$1,773.12 that had been retained by the city. The plaintiff could not properly have been allowed for this amount, but there appears to be no exception to the charge raising the question, and the parties must be deemed, therefore, to have acquiesced in the charge in this regard.

The case of *Everson v. Powers* (89 N. Y. 527), has no application to the one under consideration. In that case the action was for damages suffered in consequence of a breach of contract. In this case it is to recover pay for services rendered, and the question is as to whether the amount earned had become due and payable at the time the action was brought.

We have examined the other exceptions appearing in the case, but find none that point to error.

The judgment should, consequently, be affirmed, with costs.
All concur.

Judgment affirmed.

Statement of case.

EDWIN F. BABBAGE Appellant, v. DANIEL W. POWERS,
Respondent.

130	281
144	285
130	281
156	358
130	281
157	319

While the public is entitled to have a street or highway remain in the condition in which it placed it, and whoever, without special authority, materially obstructs it or renders its use hazardous by doing anything upon, above or below the surface, is guilty of a nuisance, when it appears that the act was done with the consent of the proper officials, the rule of liability is relaxed and rests upon and is limited by the ordinary principles governing actions of negligence.

One who receives a license to encroach upon a public street is held to an implied agreement to perform the act permitted with due care for the safety of the public.

The license, however, relieves him from the imputation of trespassing in doing the act consented to and places him simply in the position of one liable for negligence in case of omission to perform such duty.

Where a vault had been constructed, with knowledge of the city officials, under the sidewalk of a city street, in front of a block erected and used for business purposes, and had been used for nine years, *held*, consent to its construction was to be inferred from the acquiescence of the city officials having charge of the street and power to give such consent.

In the absence of a statute regulating the subject, a written consent in such case is not requisite; a verbal one is sufficient.

In an action to recover damages for injuries received by plaintiff from falling through into a vault constructed under the sidewalk in front of a block of stores belonging to plaintiff in the city of R., the following facts appeared: The vault was covered with flagstones forming the sidewalk; one of these gave way as plaintiff, a heavy man, stepped upon it, and he fell through into the vault. It was not shown when this flag was broken, or whether it was defective. No negligence on the part of defendant or his grantor in constructing or maintaining the sidewalk was claimed further than was inferable from the accident itself. The vault was so constructed under the sidewalk with full knowledge upon the part of the proper city officials and in accordance with the common custom in the erection of business blocks in the city, and had been in use over nine years. *Held*, that plaintiff was properly nonsuited; that consent to the construction of the vault was to be inferred, and that, therefore, defendant could not be made liable as a trespasser, and no negligence on his part was proved.

(Argued October 6, 1891; decided December 8, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order

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made the first Tuesday of October, 1889, which denied a motion of the plaintiff for a new trial and directed judgment for defendant on a nonsuit granted at Circuit.

Action to recover damages for a personal injury to the plaintiff caused, as alleged, by a nuisance maintained by the defendant in a public street.

The complaint alleged that on the 7th of November, 1885, the defendant being the owner, and, through his tenant, in possession of certain premises situate on State street in the city of Rochester, "without authority of law or permission from the municipal authorities of said city," maintained and continued under the sidewalk immediately in front of said premises "a certain vault excavated under said sidewalk * * * covered only by the stone flagging used by the public for passing and repassing;" that said stone flagging "was insufficient and inadequate in strength, through deficiency in quality or thickness, or by reason of some other defect to the plaintiff unknown, to sustain the ordinary travel of the public;" that by reason of such insufficiency and by the sudden breaking of one of the flagstones upon which the plaintiff was standing, he fell into the vault and sustained serious injuries.

The defendant, by his answer, denied certain allegations of the complaint, admitted that he owned the premises therein mentioned, but alleged that he did not own to the center of the street, nor beyond its outer line. He further alleged that said excavation was made, and the flagging over the same was laid, with the consent of the proper authorities, before he became the owner of the building; that the area and flagging were well and sufficiently made and maintained; that he had no knowledge or notice of any imperfection therein, and that the accident happened without any negligence or default on his part.

Upon the trial it appeared that the plaintiff was injured in front of a building known as the Ashley Block, consisting of three stores, erected in 1876. A vault, ten or twelve feet deep, excavated at the same time in front of each store, was walled up on three sides in a substantial manner and connected

Statement of case.

on the fourth by an archway opening into the cellar of the store. Each vault was covered with flagstones, supported by solid iron girders running lengthwise of the sidewalk and resting on the walls. In the sidewalk were three openings, closed by iron doors, one in front of each store, for the purpose of raising and lowering goods. The sidewalk was ten or twelve feet wide, with three rows of flagstones. After the covered area was thus constructed, and in 1883 or 1884, the defendant purchased said block, and has owned it ever since. At the date of the purchase, the store in question was rented to one Harris, who thereupon attorned to the defendant, and he has since occupied the store under renewals of the lease. November 7, 1885, the plaintiff, a man weighing 235 pounds, was walking with a friend in front of said store, and, meeting some ladies, turned toward the west, while his friend turned to the east, to allow them to pass. In thus turning out, the plaintiff stepped on a flagstone next to the curb and thereupon fell into the vault underneath, the stone, in two pieces, one a little longer than the other, falling with him, and he was seriously injured. Said stone was from two to two and one-half feet wide by four or five feet long and four or five inches thick. It did not appear when or how it was broken, nor whether it was defective in any respect, nor was the cause of the accident shown, except as thus stated. The plaintiff, who had an office and lodging-rooms next door to the Ashley Block, and had for years passed over the walk, testified that at the time of the accident it "was apparently just as he had always seen it." It did not appear expressly that the defendant had ever seen said block, or that he knew or had heard of the existence of said excavation. The evidence, from which it is claimed that notice of its existence should be inferred, is the purchase of the block by him; the receipt of rent therefor through his clerk; the renewal of the Harris lease by him in person, and his presence on one occasion in the city of Rochester, where a witness met him "as he was coming out of his bank." It was admitted that "no evidence was given of any negligence on the part of the defendant, or of his grantor, in constructing or maintain-

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ing the flagging which gave way, any further than such negligence is inferable from the accident itself."

Theodore Bacon for appellant. The excavation under the highway, into which the plaintiff fell, was a common and public nuisance; or, strictly and properly, a *perpresture*. (2 Story's Eq. Juris. §§ 921, 922; *Irvine v. Wood*, 51 N. Y. 224; *Dygert v. Schenck*, 23 Wend. 446; *Congreve v. Smith*, 18 N. Y. 79; *Anderson v. Dickie*, 1 Robt. 238; *Whalen v. Gloucester*, 4 Hun, 24; *Conklin v. Phoenix Mills*, 62 Barb. 299; *Hotel Association v. Walters*, 23 Neb. 280; Dillon on Mun. Corp. §§ 1032, 1033; *Clifford v. Dam*, 81 N. Y. 52; *Wolf v. Kilpatrick*, 101 id. 146.) This defendant, although he did not originally construct the vault which on the evening in question was shown to be a nuisance, nevertheless is liable as one who "maintained" or "continued" it. (*Irvine v. Wood*, 51 N. Y. 224; *Davenport v. Ruckman*, 10 Bosw. 20; *King v. Peddy*, 1 Ad. & El. 822; *Clark v. Fry*, 8 Ohio St. 359; *Bush v. Steinman*, 1 B. & P. 404; *Gandy v. Jubber*, 5 B. & S. 78, 485; 9 id. 15; *Dalay v. Savage*, 145 Mass. 38; *Sanford v. Clark*, 59 L. T. Rep. [N. S.] 226.) If license from the city authorities can be inferred, no license at all events can reasonably be assumed but one which imposes the condition of protecting the public from injury. (*Mairs v. M. R. E. Assn.*, 89 N. Y. 498.)

Albert H. Harris for respondent. The area was not a nuisance *per se*. (*Jennings v. Van Schaick*, 108 N. Y. 530; *City of Chicago v. Robbins*, 71 U. S. 657; *Dygert v. Schenck*, 23 Wend. 445; *Bond v. Smith*, 113 N. Y. 378; *Congreve v. Morgan*, 18 id. 84; *Fisher v. Thirkell*, 21 Mich. 1.) The evidence shows that the defendant is not liable. (*Clancy v. Byrne*, 56 N. Y. 129; *Wenzlick v. McCotter*, 87 id. 122; *Wolf v. Kilpatrick*, 101 id. 146; *Ahern v. Steele*, 115 id. 203.) Mr. Powers' title extended only to the east line of State street, and he was not the owner of the area. (*Harris v. Elliott*, 10 Pet. 25; *Jackson v. Hathaway*, 15 Johns. 447; *Tyler v.*

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Hammond, 28 Mass. 193, 212; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Root v. Wadhams*, 107 id. 394.) The duty of keeping this area safe and in repair rested upon the occupant and not upon the defendant. (*Swords v. Edgar*, 59 N. Y. 28, 33; *Pretty v. Bickmore*, L. R. [8 C. P.] 401; *Kirby v. Boylston Market*, 80 Mass. 249; *City of Lowell v. Spaulding*, 58 id. 277; *Shipley v. Associates*, 101 id. 251.) If this area properly cared for and repaired would not become a nuisance, the defendant is not liable. (*Swords v. Edgar*, 59 N. Y. 28.) If this area was originally a nuisance, having bought the property with the area existing upon it, the defendant is not responsible to the plaintiff, unless notice to him of the existence of the nuisance is shown. (*C. S. Road v. B., N. Y. & E. R. R. Co.*, 51 N. Y. 573; *Bond v. Smith*, 44 Hun, 219; *Haggerty v. Thompson*, 45 id. 398; *Nichols v. Boston*, 98 Mass. 39.) The plaintiff's objections to the testimony received to the effect that such areas as this were common throughout the city, were properly overruled. (*Raymond v. City of Lowell*, 60 Mass. 524; *Packard v. New Bedford*, 91 id. 202.)

VANN, J. The plaintiff does not claim that the defendant was negligent, but seeks to make him liable as a trespasser, upon the ground that the covered excavation in the street had never been authorized or consented to by the municipal authorities.

The law holds those who impair the safety of a public street to a strict liability. Thus in *Congreve v. Smith* (18 N. Y. 79), it was said that "persons who, without special authority, make or continue a covered excavation in a public street or highway, for a private purpose, should be responsible for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use. * * *

The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it, and whoever, without special authority, materially obstructs it, or renders its use hazardous by doing anything upon, above or below the surface, is guilty of a nuisance. * * * No

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question of negligence can arise, the act being wrongful.
* * * There can be no difference in regard to the nature of the act or the rule of liability, whether the fee of the land within the limits of the easement is in a municipal corporation, or in him by whom the act complained of was done." In another case, arising out of the same accident, it was held that even if the stone covering the excavation was broken, after it was laid, by the wrongful act of others, the defendants would still be liable, because they were bound at their peril to keep the area covered in such a manner that it would be as safe as if it had not been built. (*Congreve v. Morgan*, 18 N. Y. 84.) These cases have been followed and made the basis of judgment in many others. (*Creed v. Hartmann*, 29 N. Y. 591; *Irvine v. Wood*, 51 id. 224; *Whalen v. Gloucester*, 4 Hun, 24; *Anderson v. Dickie*, 26 How. Pr. 105; *Wendell v. Mayor, etc.*, 39 Barb. 329; *S. C.*, 4 Keyes, 261.) Although called to the attention of the court, they seem to have been disregarded in *McCarthy v. City of Syracuse* (46 N. Y. 194, 199), where it was said: "The excavation by the plaintiffs of the area under the sidewalk was not unlawful. They owned to the center of the street, subject to the right of way of the public over the surface. For any interference with this right of way the plaintiffs would have been responsible, but so long as they did no injury to the street, they were at liberty to use the space under it, as they might any other part of their property." Assuming, however, the rule to be as stated in the *Congreve* cases (*supra*), when the excavation is made without authority (*Clifford v. Dam*, 81 N. Y. 52, 56), it is clear that when it is made with the consent of the proper municipal officers, the rule of liability relaxes its severity and rests upon the ordinary principles governing actions of negligence. The person receiving the license is held to impliedly agree to perform the act permitted with due care for the safety of the public, and is made liable for any violation of duty in this regard. (*Village of Port Jarvis v. First National Bank*, 96 N. Y. 550, 556; *Clifford v. Dam*, 81 id. 52; *Dickinson v. Mayor, etc.*, 92 id. 584, 587; *Village of Seneca Falls v.*

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Zalinski, 8 Hun, 571, 574; *Newton v. Ellis*, 85 Eng. C. L. 123.)

When conditions, whether express or implied, are annexed to the license, substantial compliance therewith is essential to the protection of the licensee, but consent and compliance relieve the owner from the imputation of trespassing in doing the act consented to, and place him in the position of one liable for negligence only. (*Wolf v. Kilpatrick*, 101 N. Y. 146; *Nolan v. King*, 97 id. 565; *Elliot on Roads & Streets*, p. 541.)

It did not appear on the trial of this action that express authority had been given by the city of Rochester, or in its behalf, either to the defendant or his grantor, to construct or maintain the covered area in question. On the contrary, a witness called by the plaintiff testified that during and prior to the year 1876, he was a member, and the clerk, of the board of public works, which had charge of "public matters, streets, walks and such things," and the members of which were commissioners of highways; that such board expired in April or May of that year, and was succeeded by the executive board, possessing similar powers, and that he was also clerk of that board; that upon examining the records of both boards kept by him for the year 1876, "and about that time," he did not find that any written permission had been given by either of those bodies "to excavate and construct a vault under the sidewalk in front of the premises known as the Ashley Block;" and that at this time "the common council did not exercise jurisdiction over such subjects." On the cross-examination of this witness, however, it appeared that while he was a member of one or the other of said boards he observed the work of constructing the Ashley Block as it was going on; that in 1876 and for some years prior, it was the common practice to make excavations, such as that in question, under the sidewalks, to cover them with flagstones and to make openings therein as means of access thereto and to the cellars of stores; that this was very common on State street in the neighborhood of the Ashley Block; that one Thompson, who as contractor built the vault in front of that block, was at the time a member of the board

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of public works; that another member did business a little below said block, and other members in the same locality, and that all of the members were accustomed to go about the city for the purpose, as it is assumed, of inspecting the streets and sidewalks. It appeared from other testimony that State street was a business street, and that covered excavations such as the one under consideration, were common all over the city. There was no evidence of any objection on the part of the city or its officers.

At the close of the evidence, a motion to nonsuit was made and granted upon the ground, among others, that the plaintiff had failed to make out a cause of action against the defendant. No request to submit any question to the jury was made by the counsel for the plaintiff, who contented himself with an exception to the decision of the court in granting the motion.

The foregoing facts, which were undisputed, were deemed sufficient by the courts below to justify the nonsuit upon the ground, as stated by the learned General Term, that "while it does not appear by positive proof that the owner obtained a license or permit from the municipal authorities to excavate the space under the sidewalk, such authority may reasonably be inferred from the use of the same for the period of nine years, without objection, with actual knowledge on the part of the city officials that the same existed."

The question presented for our determination, therefore, is whether consent to the maintenance of this vault may be inferred from the long acquiescence of the municipal authorities, under the circumstances stated?

A similar question was under consideration by this court in the case of *Jennings v. Van Schaick* (108 N. Y. 530), where the plaintiff fell through an uncovered and unguarded coal-hole in the sidewalk. Although the building was rented in flats or apartments to tenants who used the coal-hole, the owner was held liable because he remained in control of the halls and a part of the basement, and employed a janitor to take care of the premises, who, in the discharge of his duty as such, controlled the coal-vault and the opening thereto in the sidewalk,

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and through his negligence in leaving the hole unguarded, the accident happened. The court in discussing an exception to the charge of the court that the action was based on a wrongful act, said: "It does not appear that the defendant, who owned the premises, had ever obtained from the municipal authorities any formal license or permission to construct the opening in the sidewalk, but such authority was a reasonable inference from an acquiescence of eighteen years without objection from the city. Assuming, however, that authority for the construction had been granted, the duty of safe covering and of protection when open remained, and if not performed, the unguarded opening became at once a wrong and a nuisance. * * * We have assumed that, from long use and acquiescence, the consent of the municipal authorities to the construction of the coal-vault and its aperture should be inferred, and so the structure was not, in and of itself, a nuisance. But the consent of the city is conditional upon certain modes of use, and if the opening is left unguarded it becomes at once a trap and a nuisance."

Thus, while the court held the owner liable on the ground of negligence, it also held that he was not liable as an original trespasser, because it inferred from the acquiescence of the municipal officers that they had consented to the construction and maintenance of the covered area. The question was presented to the Supreme Court of the United States in *Chicago City v. Robbins* (2 Black, 418, 425), and also in *Robbins v. Chicago City* (4 Wall. 657, 679), where it was held that permission to build and maintain an area in a public sidewalk might be inferred from the fact of its construction and maintenance without objection from the officers of the city. So, it has been held, that the deposit of building materials in a street for use in the erection of a house, with the full knowledge of the superintendent and trustees of the village, is sufficient to authorize and even compel a jury to find consent by implication to such use of the street. (*Village of Seneca Falls v. Zalinski*, 8 Hun, 571, 573.)

The Supreme Court of Massachusetts in laying down a

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similar rule, said: "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation and much on public usage. The general use and the acquiescence of the public is evidence of the right. The owner may make such a reasonable use of a way adjoining his land as is usually made by others similarly situated. As to the reasonableness of the use it may well be laid down that in a populous town where land is very valuable, when the owner of a lot, has occasion to build, and for that purpose to dig cellars, he may rightfully lay his building material and earth within the limit of the streets, provided he takes care not to improperly obstruct the same, and to remove them in a reasonable time." (*Van O'Linda v. Lothrop*, 21 Pick. 292, 297.)

The Supreme Court of Michigan holds that excavations properly and safely constructed under the public streets of cities for the convenience of the owners of premises adjoining are not unlawful, even in the absence of permission from the municipal authorities. (*Fisher v. Thirkell*, 21 Mich. 1, 21.)

In Illinois, the rule, as laid down by its Supreme Court, is that where the corporate authorities of a city have knowledge of the fact that a lot owner is constructing a vault under the sidewalk for his own convenience, and make no objection, authority to construct the same may be inferred, and when the same is continued for many years without objection, the acquiescence on the part of the city will be regarded as sufficient authority to construct and maintain it in a careful and prudent manner. (*Gridley v. City of Bloomington*, 68 Ill. 47, 50.) In an earlier case involving the same question, that learned court said: "We are not prepared to admit that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend his coal cellar under it, but as such a privilege is of great convenience in a city, and may, with proper care be exercised with little or no inconvenience to the public, we think that authority to make such cellars may be implied in the absence of any action of the corporate authorities to the contrary, they having been aware of the progress of the work." (*Nelson v.*

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Godfrey, 12 Ill. 20, 23.) See also *Clark v. Fry* (8 Ohio St. 358); *Wood v. Mears* (12 Ind. 515); *Mallory v. Griffey* (85 Pa. St. 275); *Hundhausen v. Bond* (36 Wis. 1); *Irvin v. Fowler* (5 Rob. 482); Dillon on Mun. Corp. vol. 2, §§ 699, 700; Cooley on Torts, 748. We have been referred to no case, and have found none, criticising or condemning the doctrine of implied consent as thus laid down by the courts.

The giving of consent is an executive act, which from its nature does not require an ordinance or resolution, as in the case of a legislative act, or a written entry or decision, as in the case of a judicial act. Where the power resides in a single officer, and there is no statute regulating the subject, no reason is apparent why his verbal consent would not suffice, the same as a verbal license from an adjoining owner to his next neighbor, to construct on the land of the latter a wall or anything which, without consent, would be a trespass. (*Miller v. Auburn, etc., R. R. Co.*, 6 Hill, 61; *Murray v. Gibson*, 21 Ill. App. 488; 13 Am. & Eng. Ency. 546.) So consent by a board might be given orally by the assembled body when inspecting the premises. An individual proprietor, standing by and witnessing an erection on his land by the adjoining owner, which would be a trespass if not consented to, by not objecting, impliedly consents. Why should not actual knowledge by city officers, having the power to give consent, and their persistent acquiescence for year after year, both before and after the premises had changed owners, in the maintenance of said vault, be given the effect of actual consent thereto? In answering this question due consideration should be given to the convenience of commerce and the necessities of business in crowded cities. Due regard should also be had to the custom with reference to constructing vaults under sidewalks, so universal in the erection of modern buildings for business purposes in the cities of this state, that the court may take judicial notice of the fact, as a matter of constant observation and common knowledge. (*Gibson v. Stevens*, 8 How. [U. S.] 384, 399; *Raymond v. City of Lowell*, 6 Cush. 524, 534; Wade's Law of Notice [2d ed.], §§ 1408, 1410, 1417.)

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We think that both upon principle and authority consent to an act so common and necessary as the construction of a vault under the sidewalk in front of a block erected and used for business purposes, must be conclusively inferred from the acquiescence of those having charge of the street for the public for so long a period as nine years.

The judgment should be affirmed, with costs.

All concur, except BRADLEY and PARKER, JJ., not voting.
Judgment affirmed.

MORRIS STEINHARDT, Appellant, v. EDWARD CUNNINGHAM,
Respondent.

While no particular words in a will are necessary to create a trust, and one may be implied where, from the whole will, it is apparent that to accomplish the purposes of the testator, it will be convenient and advantageous that the executors should be vested with the legal estate; the scheme of the statute is in the direction of such a construction as will vest title to the real estate in the heirs or devisees rather than the executors, if the wishes of the testator may be carried out under a trust power.

In such a case, therefore, although there is a devise in terms to executors or trustees to sell or mortgage the real estate, the title descends to the heirs or passes to the devisees subject to the execution of the power.

It is essential to the constitution of a valid trust, for any of the purposes referred to in the Statute of Uses and Trusts (1 R. S. 728, § 55), that the power of sale conferred upon the trustees be absolute and imperative; a discretionary power of sale is not sufficient.

The will of F., after directing the payment of his debts, etc., by its terms gave all of his estate to his executors, *i. e.*, his wife and H., "to have and to hold the same to themselves, their heirs and assigns forever upon the uses and trusts following." The will then gave various legacies to the testator's children; these were followed by a residuary clause by which he gave all the residue of his estate, "after providing for the aforesaid bequests, * * * absolutely and forever" to his wife. "Full power and authority" was given to the "said trustees, executor and executrix * * * to sell any or all" of the real estate "as they may deem best." The executors were appointed trustees and guardians of the children during their minority. H. omitted to qualify as executor, and letters testamentary were granted to the widow alone.

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In an action to foreclose a mortgage on certain real estate of which F. died seized, the widow was made a party, but H. was not. Defendant, who acquired title under the foreclosure sale, contracted to sell the same to plaintiff. In an action to recover back moneys paid and expenditures under the contract, on the ground of defect in defendant's title, *held*, that no valid trust was created by the will; that the purposes of the testator could be accomplished through a trust power; that the trustees took no title to the real estate, but the same vested in the widow; and, therefore, that H. was not a necessary party to the foreclosure suit, and defendant acquired a good title under the sale.

Reported below, 55 Hun, 875.

(Argued October 16, 1891; decided December 8, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 24, 1890, which reversed a judgment in favor of the plaintiff entered upon a decision of the court on trial at Special Term, and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

George H. Yeaman for respondent. This action is properly brought, since the defendant was not able to give the plaintiff the title to the premises in question free from all encumbrance except the mortgages mentioned in the contract. (R. S. chap. 1, art. 2, § 55.) The will of the testator created a trust for the benefit of legatees, and the legal title to that portion of said premises which belonged to the testator was vested in Jonas Heller and Rosa Freedman. (2 R. S. chap. 1, art. 2, § 55; *Tobias v. Ketchum*, 32 N. Y. 319, 330; *Ward v. Ward*, 105 id. 68, 74; *Robert v. Corning*, 89 id. 225, 237; *Morse v. Morse*, 85 id. 59; *Woodward v. James*, 44 Hun, 98; *Brauley v. Amidon*, 10 Paige, 235; *Vernon v. Vernon*, 53 N. Y. 351; *Miller v. Wright*, 109 id. 194.) The provisions in this will create a trust in the lands of the testator on the separate and independent ground that the legacies are made a charge upon his land, and the trustees are authorized to sell or to receive the rents and profits for the purpose of satisfying the charge. (*Fenwick v. Chapman*, 9 Pet. 461; *Peter v. Beverly*, 10 id.

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564; *Newman v. Johnson*, 1 Vern. 45; *Kidney v. Cousmaker*, 1 Ves. 440; *Lupton v. Lupton*, 2 Johns. Ch. 624; *Hoyt v. Hoyt*, 85 N. Y. 142; *Taylor v. Dodd*, 58 id. 335; *McCorn v. McCorn*, 100 id. 511; *Brill v. Wright*, 112 id. 129.) The trust created by the will is not affected by the fact that Jonas Heller, one of the trustees named, did not qualify as executor. Notwithstanding that omission, he was still trustee. (*Judson v. Gibbons*, 5 Wend. 224; *Conklin v. Egerton*, 21 id. 436, 437, 438; *Dunning v. O. N. Bank*, 61 N. Y. 497-501, 502; *Thom v. Shiel*, 15 Abb. [N. S.] 81, and note; *Carroll v. Carroll*, 16 id. 239; *Dominick v. Michael*, 4 Sand. 374; *Conklin v. Egerton*, 21 Wend. 430; *Burritt v. Silliman*, 13 N. Y. 93-96; 2 Washb. on Real Prop. [3rd ed.] 471.) The title to Solomon Freedman's real estate being vested in him subject to a mortgage, under the foreclosure of which the defendant assumed to convey to the plaintiff, did not pass to the defendant, because there was a radical defect in the proceedings, on account of the fact that Jonas Heller was not made a party defendant therein. (*Wilder v. Ranney*, 95 N. Y. 7; *Hall v. Nelson*, 23 Barb. 88; *Griswold v. Fowler*, 6 Abb. Pr. 113; *Brennan v. Wilson*, 71 N. Y. 502.) The legacies are a charge on the land in the nature of an inalienable trust. Accordingly, the fact of joining the legatees as defendants in the foreclosure action was wholly ineffectual to make the title, under the foreclosure, good. Owing to the omission to make Jonas Heller, trustee, a party, the court was without jurisdiction, and the proceedings were void. (*Reid v. Marble*, 10 Paige, 409; *Loder v. Hatfield*, 71 N. Y. 92; *Brown v. Knapp*, 79 id. 136; *Leggett v. Perkins*, 2 id. 297; *Graff v. Bonnett*, 31 id. 9, 19; *Campbell v. Foster*, 35 id. 361; *Williams v. Thorn*, 70 id. 270; *Lent v. Howard*, 89 id. 169, 181; *Cutting v. Cutting*, 86 id. 522, 546, 547; *Cook v. Lowry*, 95 id. 103, 111; *Hutton v. Benkard*, 92 id. 295; *Genet v. Hunt*, 113 id. 158, 168; *U. S. T. Co. v. Roche*, 116 id. 120.) Rosa Freedman, the other trustee, was not made a party defendant as trustee in the foreclosure suit. She was made a defendant individually and as executrix, but not as

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trustee, and consequently was in no situation to appear or take issue in such representative capacity, or to protect her right as trustee. (*Landon v. Townshend*, 112 N. Y. 96.) The sale of the fourth lot of the premises in question under the decree of said foreclosure suit, after more than sufficient had been realized to pay the amount due to the plaintiff and all expenses, was unauthorized by the judgment. (*McBride v. Lewisohn*, 17 Hun, 524-526; *Mallory v. Clark*, 20 How. Pr. 418.) There is no estoppel binding the legatees in this cause. (Bigelow on Est. 49; *Galpin v. Page*, 18 Wall. 350; *Durant v. Abendroth*, 97 N. Y. 132.) The opinion of the General Term, reversing the judgment for plaintiff at Special Term, is erroneous in its reasoning, and supplies no true ground for upholding the foreclosure. (*Burritt v. Silliman*, 13 N. Y. 93; *Wilder v. Ranney*, 95 id. 7; *Brinckerhoff v. Wemple*, 1 Wend. 470.) Under the contract of sale in this case the plaintiff was entitled to have the premises in question conveyed to him free from all incumbrances, except the mortgages set forth in the contract, and he was justified in refusing to take the title subject to the defects above enumerated. (*Shriver v. Shriver*, 86 N. Y. 586; *Jordon v. Poillon*, 77 id. 518; *Fleming v. Burnham*, 100 id. 1-9.) An action at law will be sustained to recover back the installment paid by plaintiff on a contract for the purchase of property, as in the case in question. (*Moore v. Williams*, 115 N. Y. 586.)

Theodore W. Dwight for appellant. The burden of proof was upon plaintiff. (*Shriver v. Shriver*, 86 N. Y. 585; *Moser v. Cochrane*, 107 id. 41; *Ferry v. Sampson*, 112 id. 415; *Fleming v. Burnham*, 100 id. 11; *Spring v. Sanford*, 7 Paige, 550; *Schermerhorn v. Niblo*, 2 Bosw. 161; *Stapylton v. Scott*, 16 Ves. 272; *M. E. Church v. Thompson*, 108 N. Y. 619; *Baylis v. Stimson*, 110 id. 621.) The questions of law claimed by the plaintiff to be doubtful questions affecting the title were not real questions, they were speculative and hypothetical, possessing no practical value. (*Goebel v. Iffla*, 111 N. Y. 170, 177; *Corcoran v. C. & O. C. Co.*, 94 U. S.

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741 ; *Jordan v. Van Epps*, 85 N. Y. 427, 435 ; *Cook v. Platt*, 98 id. 35 ; 1 R. S. 730, § 175 ; *Leavitt v. Wolcott*, 95 N. Y. 212 ; *Clift v. Moses*, 116 id. 144 ; *Woerz v. Rademacher*, 120 id. 62.) The affirmative was on the plaintiff to establish facts which raised doubtful questions of law, or disclosed outstanding vested rights hostile to the title. (*Scholle v. Scholle*, 113 N. Y. 261 ; *Moser v. Cochrane*, 107 id. 35 ; *Hayes v. C. Co.*, 108 Mass. 400.) If Jonas Heller was not a necessary party to the foreclosure action, the title conveyed to the purchaser at the foreclosure sale by the referee was a good one. (Perry on Trusts, § 502.) The objections as to errors in the foreclosure proceedings are wholly without merit. (*Bechstein v. Schultz*, 45 Hun, 191 ; *Everson v. Johnson*, 22 id. 115 ; *Andrews v. O'Mahoney*, 112 N. Y. 568 ; *DeForrest v. Farley*, 62 id. 628 ; *Wolcott v. Schenck*, 23 How. Pr. 385 ; *Abbott v. Connor*, 98 N. Y. 665 ; *Woodhull v. Little*, 102 id. 165 ; Code Civ. Pro. § 1632 ; 2 Edmund's Stat. at Large, 200, § 158.)

PARKER, J. This action was brought to recover money advanced on an executory contract for the purchase of land, and for the expenses of a search subsequently incurred, on the ground that the defendant is not able to give a good title.

The defendant acquired his title through a judgment of foreclosure and sale, and it is contended by the appellant that one of the parties in whom the legal estate of an undivided one-half of the premises was vested at the time of the commencement of the suit was not made a party, and, therefore, such estate did not pass to the purchaser at the foreclosure sale.

Solomon Freedman died seized of one undivided half of the premises in question, subject to a mortgage. He left a will in which after directing the payment of his debts and funeral expenses, he in terms devised and bequeathed all his estate "To my beloved wife Rosa Freedman, and to my good friend Jonas Heller, of New York city, to have and to hold the same to themselves, their heirs and assigns forever upon the uses and trusts following, viz: At the time of my death, should my daughters Fannie and Rachel, or either of them be unmar-

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ried, I give and bequeath to such of them as may be unmarried the sum of \$5,000."

In Item 2d the testator declares: "I give, devise and bequeath to each of my sons Jacob, William and Simon Freedman, the sum of \$5,000, lawful money of the United States, as soon as they respectively attain their majority. * * * To my son Benjamin Freedman, I give and bequeath \$5.00 * * * he having already received from me in cash \$5,000. These bequests shall by my executor and executrix, trustees and guardians hereinafter named be safely invested upon interest for their and each of their, my said children's benefit and behoof * * *." Then follows this residuary clause: "All the rest and residue of my estate real, personal and mixed of which I may die seized and possessed and to which I may be entitled at the time of my death, after providing for the aforesaid bequests and the accumulations thereon, I give, devise and bequeath absolutely and forever to my beloved wife Rosa Freedman, subject solely to her own free will and control and disposal as to her may seem meet and proper in lieu of her dowery."

Item 3d provides for the disposition of the share bequeathed to either of the children in the event of their death before a division of the estate.

Item 4th authorizes the executors to withhold payment of the bequests to the sons until such time as their conduct or position in life should be deemed satisfactory.

Then follows item 5: "I give to my said trustees, executor and executrix full power and authority to sell any or all of my real estate at public or private sale and invest the proceeds thereof, or to let or sell the same as they may deem best for the interest of my family."

Item 6th has no bearing on the question before us.

Item 7 is as follows: "I hereby nominate, constitute and appoint my said beloved wife Rosa Freedman, and my friend Jonas Heller, of the city, county and state of New York, trustees and guardians of the persons and effects and of the estate of my children during their and each of their minority, and also to the executor and executrix of this my last will and

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testament. And I commend my children to their fostering care and protection."

Jonas Heller omitted to qualify as executor, but Rosa Freedman did, and letters testamentary were, therefore, granted to her alone, and she thereafter proceeded to the discharge of the executory duties devolving upon her. In the suit brought for the foreclosure of the mortgage, the legatees were defendants and Rosa Freedman was made a party individually and as executrix. But the plaintiff insists that by the terms of the will, an express trust was created by which the title to the real estate became vested in the trustees; that while Heller did not qualify as executor, he took no action for the purpose of divesting himself of the estate devised to him by the testator; and, therefore, was a necessary party.

We are first to inquire then whether by the terms of the will, a valid express trust was created which vested in Mrs. Freedman and Jonas Heller the title to testator's real estate. If not, we need not examine the other questions discussed by the appellant, because this proposition lies at the very foundation of his contention.

It may be doubted whether the testator intended to create an express trust, notwithstanding the devise was in terms to the executors as individuals, in view of the other provisions of the will. True, after the direction to the executors to pay debts and funeral expenses, he in terms devised all his estate to Rosa Freedman and Jonas Heller, their heirs and assigns forever, upon the uses and trusts following. But this devise is not immediately followed by the direction to the trustees to sell, or mortgage the estate, or to receive rents, profits and income thereof, and make disposition of them in a manner provided. On the contrary, the next sentence is as follows: "At the time of my death should my daughters Fannie and Rachel, or either of them, be unmarried, I give and bequeath to such of them as may be unmarried the sum of \$5,000." Item 2d follows with a bequest of a like amount to each of the testator's sons, and it concludes with a residuary clause in which the testator gives and devises all the residue of his

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estate, real, personal and mixed, to his wife Rosa Freedman. And after "items 3 and 4," he confers by "item 5" upon the persons named as executors, authority to sell any or all of his real estate and invest the proceeds, or to let or lease the same as they may deem best for the interests of the family.

The executors were not required to sell, but they were authorized to sell if necessary to discharge the executorial duties conferred upon them. It seems to be clear that the testator had in mind that should his personal estate prove sufficiently large to discharge the legacies given by the will, then there would be no occasion to sell the real estate, for he devised in terms the residue of his real estate to his wife, and by the power of sale, which stands alone, he empowers a sale of any or all of his real estate or permits it to be leased. But assuming that the testator intended to pass the title of his estate to the individuals named, it is not contended that a valid express trust was created, unless it may be said to be within the protection of subdivision 2 of section 55, which provides for a trust to sell lands for the benefit of legatees or to satisfy a charge thereon. This provision is qualified by section 56, which declares that "a devise of land to executors or other trustees to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees, but the trust shall be valid as a power, and the land shall descend to the heirs or pass to the devisees of the testator, subject to the execution of the power."

Where leases are to be made, tenants put into possession and dispossessed, the possession of the legal estate in the trustees is convenient and reasonably necessary, and for that purpose the statute permits a grant or devise of title to those charged with the execution of such duties. And it is true that no particular words are necessary to create a trust, and one may be implied where from the whole will it is apparent that the testator intended that the trustees should be empowered to receive the rents and profits, and for that purpose, and to accomplish the other objects of the will, it appears to be convenient and advantageous that they should be vested with the legal estate.

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(*Robert v. Corning*, 89 N. Y. 237.) But in all other cases of a grant or devise of land to executors or trustees, to be sold or mortgaged, the title of the land descends to the heirs or passes to the devisees, subject to the execution of the power. The scheme of the statute is, therefore, in the direction of such a construction as will vest the title in the heirs or devisees rather than the executors, and permits the working out of the wishes of the testator when legal under a trust power. And we are unable to discover in this will any barrier in the way of the accomplishment of the purposes of the testator through a trust power; therefore, no reason exists for straining after a construction that will declare a trust.

The power of sale is not coupled with the language intended to create a trust; does not in terms refer to it, or apply to the trust purpose, nor is it imperative. It does not direct a sale of all his lands, leaving the time of sale merely in the discretion of the executors, but authorizes a sale of "any or all" of testator's real estate, or permits it to be let or leased, as may be deemed for the best interests of the family. And this discretionary power is consonant with the residuary clause in the will, which, after the payment of bequests, gives and devises to his wife all the rest and residue of his estate, real, personal and mixed.

It has been held by this court in *Cooke v. Platt* (98 N. Y. 35) that it is essential to the constitution of a valid trust for either of the purposes referred to in section 55, "that the power of sale conferred upon the trustees must be absolute and imperative, without discretion, except as to the time and manner of performing the duty imposed, and that it is not sufficient to invest the trustees with a merely discretionary power of sale, which may or may not be exercised at their option, and which does not operate as a conversion." As a valid trust was not created, the legal estate was not vested in the trustees.

It follows that Heller was not a necessary party to the foreclosure.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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LEWIS E. WATERMAN et al., Appellants, v. EDWARD L. SHIPMAN et al., Respondents.

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169	*479
169	*481

An issue as to the existence of a license to use or manufacture a patented article is simply one as to the existence of a contract; it involves a question of title to property, as the exclusive privilege created by the issuing of a patent is property.

An action, therefore, to determine whether a license has been given does not arise "under the patent laws of the United States," and is not within the jurisdiction of the federal courts, when all the parties are citizens of the same state; but is cognizable in a state court.

Where a manufacturer has invented a new name and applied it to an article manufactured by him to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, grade or characteristics, but is arbitrary or fanciful, he is entitled to be protected in the exclusive use of the name as a trade-mark.

The use of the name by another manufacturer tends to deceive purchasers, and even if he had no actual intent to deceive, the courts are authorized to interfere, both to protect the private right of the manufacturer who invented it and the public interests.

The fact that a name so adopted indicates not only that the article is made by the manufacturer, but is an article patented by him, does not affect his exclusive right to use it as a trade-mark.

In an action to restrain defendants from using the name "Waterman's Ideal Fountain Pen," which plaintiffs claimed as a trade-mark, the trial court found that plaintiff Waterman had, for a long time previous to the commencement of the action, been the manufacturer and inventor of an article known as a fountain pen, which was stamped and labeled with the name specified; this had been adopted by him as "his own proper device and trade-mark, and was known to the public and to buyers and consumers." It appeared also that the pens manufactured by plaintiffs were made under letters patent issued to Waterman, which described the invention as a "fountain pen." Defendants manufactured pen-holders, stamped them with the same name and offered them for sale. Both Waterman and defendants stamped upon the articles so made and sold by them the dates of the patents issued to Waterman. *Held*, the word "Ideal," as used by Waterman, pointed out simply the maker, and so came within the definition of a trade-mark; that while the whole name pointed out both maker and inventor, this did not affect the right to the exclusive use of that word, and that plaintiffs were entitled to be protected in such use as applied to fountain pens.

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It appeared that W. assigned his letters patent; that S., the assignee, granted to him an exclusive license to manufacture and sell fountain penholders under said patents, the license requiring him to make returns and to pay royalties, as specified, to S., and upon failure to do this within a time specified, S. was authorized to terminate the license upon giving written notice to the licensee. Subsequently W. and S. gave to defendants their joint promissory note, and to secure payment thereof S. assigned to them the letters patent, subject, however, to the license granted to W. Defendants transferred the note and their interest in the patents to S. The note was not paid at maturity, and thereafter S. served notice of a revocation of the license on the ground of failure on the part of the licensee to make returns and payments as prescribed, and then executed to defendants a sole and exclusive license to manufacture and sell fountain pens under the patents. The note was subsequently paid; between its maturity and payment defendants manufactured and sold penholders under the patents similar to and in imitation of those made by W., and stamped "Waterman's Ideal Fountain Pen." After the note was paid, they ceased to manufacture, but continued to sell pens then on hand. It did not appear that plaintiffs manufactured anything covered by the patents during the period for which they made no returns. *Held*, that there was no effective revocation of W.'s license; that the one granted to defendants conferred upon them no right either to make or sell, and so no right to use the name; that while the relief plaintiffs might be entitled to on account of such manufacture by defendants was not involved in the action, as it related not to the use of the invention, but of the trade-mark, they were entitled to an injunction to restrain defendants from using the latter.

(Argued October 29, 1891; decided December 8, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 13, 1889, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the defendants from using an alleged trade-mark of the plaintiffs, consisting of the name "Waterman's Ideal Fountain Pen," and to compel them to account for all profits realized by them from the sale of fountain pens stamped with that name.

The answer, after denying certain allegations of the complaint, alleged that the name in question denoted a certain kind of fountain pen patented in the name of the plaintiff

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Waterman, and that it was the only name under which such patented pens were known or sold in the market; that it had no reference to the particular manufacturer of the pens, and that the defendants had never manufactured or sold, except as lawful licensees under said patent.

Upon the trial it appeared that on February 12, 1884, and also on November 4, 1884, letters patent of the United States were issued to Lewis E. Waterman, one of the plaintiffs, for an invention described "as a new and useful improvement in Fountain Pens." The application for the earlier issue of said patents was filed September 19, 1883, and for the later, June 20, 1883, and in July of the same year, said Waterman adopted the name "Waterman's Ideal Fountain Pen" for the fountain pens made under said patents, which were "substantially alike with only slight differences." The specifications describe the invention as a "fountain pen," without using either of the other words. After the patents were issued, Mr. Waterman made and sold a large number of said fountain pens, each conspicuously stamped with said name, and by that name, on account of his experience and skill, as well as the good quality of the pen, it had become widely known in the community, and had acquired a high reputation as a valuable and useful article. It commanded an extensive sale and was the source of great profit to the proprietor. Waterman subsequently assigned the letters patent to Sarah E. Waterman. The plaintiff corporation has acquired from the patentee an interest in the sale of such pens, and both of the plaintiffs have applied said name only to fountain pens so made, which are known to the trade and the public exclusively by that name.

From March 22 to November 25, 1884, the "Ideal Pen Company," a firm composed of said Waterman and the defendants, owned the right to manufacture and sell fountain pens under the patents, and with the consent of Mr. Waterman, held itself out to the public as the sole licensee and manufacturer thereof. At the latter date, the firm was dissolved by mutual consent, Waterman taking the assets, except the bills receivable which passed to the defendants, who assumed all

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the debts and obligations. As a further consideration for the adjustment, said Waterman, with said Sarah E. Waterman, gave to the defendants their joint promissory note for \$6,500, payable November 28, 1887, with annual interest, and to secure the payment of the same, said Sarah E., who was then the owner of the letters patent, assigned them to the defendants, subject, however, to an exclusive license previously granted by her to said Lewis E. to manufacture and sell fountain penholders under said patents. The license required said Lewis E. to make returns to said Sarah E., on the first of each month, of all fountain penholders "containing the said patented improvement manufactured by him," during the month preceding and on or before the fifth day of the month following to pay her the sum of twenty-five cents as a license fee on every fountain penholder so manufactured. Upon a failure to make returns after thirty days, or to make payments after ninety days from the times when returns or payments respectively became due, it was provided that said Sarah E. might terminate the license by giving written notice to the licensee. The defendants transferred said note and such interest as they had in the patents to one Asa L. Shipman, who on the 12th of December, 1887, after the note had become due and while it was unpaid, attempted to give them a sole and exclusive license to manufacture and sell fountain pens under said patents. January 10, 1888, he assumed to revoke the license to Lewis E. Waterman, apparently for the reason that the latter continued to sell fountain pens under the letters patent, and on April 26, 1888, he served a second notice of revocation on the ground of a failure to make returns due on the 1st of January and February, 1888, and payments due on the 5th of December, 1887, and January, 1888. After judgment had been recovered on said note, supplementary proceedings instituted, and a receiver appointed, and on May 16, 1888, the judgment and all costs were paid. Between the maturity of the note and the date of its payment, the defendants engaged in the manufacture of penholders under said patents, in imitation of and similar to those so made by said Lewis E. Waterman, and after

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causing them to be stamped "Waterman's Ideal Fountain Pen," offered them for sale. When the judgment was paid, they ceased to manufacture, but continued to sell such as they had on hand, all of which had been made between the dates aforesaid. Both Waterman and the defendants stamped the pens made and sold by them with the dates of the patents under the name of the pen.

After finding substantially the foregoing facts, the trial court found as a conclusion of law that the name in question, being applied to a patented article, is not a trade-mark showing the origin and manufacture of the patented article; that whoever has the right to manufacture under the patents, has the right to affix said name to the pens so made; that the defendants, while manufacturing and selling, claimed the right so to do by virtue of a license from the owner of the patents, and the complaint was dismissed because it was held that the only remedy of the plaintiff was by a suit for infringement, of which the federal courts alone have jurisdiction, or by a direct action to compel a reassignment of the patents, and as incidental thereto an accounting for the profits.

Further facts are stated in the opinion.

Walter S. Logan for appellants. The fact that the article to which the trade-mark is applied is in some of its features also covered by patents, does not deprive the plaintiffs of the protection of their trade-mark. (*Silchow v. Baker*, 93 N. Y. 67; *McLean v. Fleming*, 96 U. S. 252; *Holmes v. H. B. M. Co.*, 37 Conn. 278; *Newby v. O. C. R. R. Co.*, Deady, 609; *Lee v. Haley*, L. R. [5 App. Cas.] 155; *B. W. L. Co. v. Nasury*, 25 Barb. 416; *C. Co. v. Ames*, 17 Fed. Rep. 561; *Gray v. T. S. P. Works*, 16 id. 436.) The fact that the defendants claimed the right to manufacture and sell pens under Mr. Waterman's patents, does not deprive this court of jurisdiction to try and determine the question whether such claim was or was not well founded, requires this court to dismiss the complaint and render judgment for the defendant without reference to the validity of the defendants' claims in

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this regard. (*Morston v. Smith*, 82 N. Y. 526; *Eddleston v. Vick*, 23 Eng. L. & Eq. 51; *Selchow v. Baker*, 93 N. Y. 67; *Swift v. Dey*, 4 Robt. 614; *C. M. Co. v. C. M. Co.*, 32 Fed. Rep. 94; *D. C. Co. v. Gugenheine*, 2 Brewster, 337; *C. S. Co. v. H. R. S. Co.*, 45 N. Y. 291.)

Antonio Knauth for respondents. The name of "Waterman's Ideal Fountain Pen" is not a trade-mark, being the name of a patented article, and the only name by which said article is known to the public. Whoever has the right to manufacture fountain pens under the patents in question, has the right to designate the articles made under said patents by the name under which they are known. (*L. M. Co. v. Nairn*, 7 L. R. [Ch. Div.] —; *Fairbanks v. Jacobus*, 14 Blatch. 337; *S. S. M. Co. v. Stanage*, 6 Fed. Rep. 279; *S. M. Co. v. Riley*, 11 id. 706; *W. & G. S. M. Co. v. Frame*, 17 id. 623; *Selchow v. Baker*, 93 N. Y. 66.) If the plaintiffs' contention, to the effect that defendants had no right to use the patents during the time when they manufactured the fountain pens, is correct, the action is in substance an action for infringement of United States letters patent, and this a state court has no jurisdiction to prevent. (*C. S. S. Co. v. Clark*, 100 N. Y. 365.) The mortgage assignment of the patents in question given to Asa L. Shipman conveyed a legal title of the patents to Asa L. Shipman, which title was liable to be defeated. Until such payment, Asa L. Shipman was the legal owner of the patents, and when the note was not paid on the day of its maturity, the assignment of the patents vested an absolute title in Asa L. Shipman. (*West v. Crary*, 47 N. Y. 423.) Asa L. Shipman, as mortgagee of the patents, and, after default in payment, as absolute owner of the same, was entitled to returns from Waterman under the license agreement, and to the royalties which Waterman had agreed to pay thereunder. (*Waterman v. MacKenzie*, 138 U. S. 260, 261.) Waterman was in default when the license was revoked. (*Case v. Brown*, 1 Biss. 382; *Bell v. Daniels*, 1 Bond, 212; *Bridge v. Brown*, 1 Holmes, 205; *Dunbar v. Myers*, 94 U. S. 187.)

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VANN, J. The defendants rest their right to the use of the name in question upon the allegation that they have a license under the letters patent to make and sell the patented article, and that the right to make the article involves the right to use the name adopted by the patentee. The plaintiffs insist that no effective license was ever granted to the defendants, who in reply say that they claim to have acted under a valid license, and that the assertion of this claim divests the state courts of jurisdiction. We think, however, that an issue as to the existence of a license is an issue as to the existence of a certain kind of contract, and involves simply a question of title to property, which does not fall within the jurisdiction of the federal courts, when all the parties are citizens of the same state. The United States government, by virtue of its laws and the procedure of its patent office, created a certain exclusive privilege, popularly known as a patent right, and granted it to Lewis E. Waterman. That exclusive privilege is property, not visibly existent, but actually existing, and the official evidence thereof appears in letters patent issued by the Federal Government to said Waterman as patentee. That property, like other property, is capable of transfer by assignment. The statute which created it expressly gave it the quality of assignability, either as a whole "or any interest therein." (U. S. R. S. § 4898.)

The assignment of a certain interest has become known as a license, which is a transfer *pro tanto* of the property represented by the letters patent. An action, therefore, to determine whether a license has been given, is an action to determine the title to property, and while it involves the existence of a contract relating to a patent right, simply as property, it does not arise "under the patent laws of the United States," as interpreted by its courts. (*Hartell v. Tilghman*, 99 U. S. 547; *Albright v. Teas*, 106 id. 613; *Dale Tile Mfg. Co. v. Hyatt*, 125 id. 46; *Ingalls v. Tice*, 14 Fed. Rep. 352; *McCarty & Hall Trading Co. v. Glaenzer*, 30 id. 387; *Merserole v. Union Paper Collar Co.*, 6 Blatch. 356.)

The same rule has been repeatedly recognized by this court,

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which has held it applicable even when the action involved the validity of a patent. (*Hyatt v. Ingalls*, 124 N. Y. 93; *Middlebrook v. Broadbent*, 47 id. 443; *Continental Store Service Co. v. Clark*, 100 id. 365; *Marston v. Sweett*, 82 id. 526.)

An infringement, as applied to patents, is a violation of the exclusive right conferred upon the patentee. An adjudication that a certain act is an infringement necessarily requires the construction of the right and, by comparison of principles or processes, a determination as to its nature and extent. An action to prevent an alleged infringer from using the right, as patented, involves the existence or preservation of the monopoly granted by the patent and necessarily arises under the patent laws. Jurisdiction of such actions has been conferred upon the federal courts, and it is held to be exclusive. (*St. Paul Plough Works v. Starling*, 127 U. S. 376; *Hyatt v. Ingalls*, *supra*; *Hat Sweat Mfg. Co. v. Reinoehl*, 102 N. Y. 167; *Smith v. Standard Laundry Machinery Co.*, 19 Fed. Rep. 825.) Clearly no question as to infringement arises in this case, because both parties recognize the existence, validity and use of the patents, but differ as to the ownership of certain rights thereunder, which will now be considered.

The instrument relied upon by the defendants as a license is dated December 12, 1887, and purports to be a grant to them from their assignee, under a writing of an earlier date, of "the sole and exclusive right and license to manufacture, use and sell the several inventions described in said two letters patent throughout the United States." The power to make this grant depended upon the assignment from Sarah E. Waterman to the defendants dated November 25, 1884, which was in the nature of a mortgage, and was to be "null and void" upon payment of the note that it was given to secure. (U. S. R. S. § 4898; *Waterman v. Mackenzie*, 138 U. S. 252.) That assignment, however, was made subject in express terms to the license agreement dated November 20, 1884, from Sarah E. to Lewis E. Waterman, whereby she granted to him "the sole and exclusive right and license to

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manufacture and sell fountain penholders containing the said patented improvement throughout the United States." While these instruments were in force, it is clear that the only person who had a right to make or sell articles protected by the patents was Lewis E. Waterman, as his grant was prior in date and exclusive in scope. The defendants acquired by the original grant to them of November 25, 1884, simply the right to returns and royalties, with the remedy for default in making either, as provided in the instrument dated November 20, 1884, and they acquired no greater right from their assignee on December 12, 1887. The grant to the defendants of the right to make and sell in certain territory, subject to the grant to Lewis E. Waterman of a prior and exclusive right to make and sell throughout the same territory, conferred upon them no right either to make or sell, as their grantor could not transfer to them what had been previously transferred, with their knowledge, to another. Even if the grant to the defendants, although not operative as a license, transferred to them such rights as their grantor possessed at the time, which it did not purport to do, still the defendants would be without the protection afforded by a license, because the trial judge did not find and there is no evidence authorizing him to find, an effective revocation of the exclusive license to Lewis E. Waterman. The evidence relied on to establish such a manufacturing of penholders as to require the making of returns and the payment of royalties, consisted of testimony showing that Mr. Waterman put unpatented pens into patented penholders, that he had made and had on hand before the note became due, and prior to that time it is not seriously claimed that there was any obligation to make returns. This was not a manufacturing of penholders, but simply an adjustment to suit the tastes of customers, as no particular kind of pen was to be used with the penholder. If one buys a penholder and pen, he can change the pen without the imputation of manufacturing. The specifications of each patent refer to "the ordinary writing pen" and contemplate its use with the article invented. Mr. Waterman "manufactured" no fountain pens, within the

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proper meaning of that word as used in his license, prior to February 1, 1888, and after that date his returns were regularly made and before any payments became due, the loan was paid and there was no further obligation to make either returns, or payments to the defendants, or their assignor. The attempts to revoke the license, therefore, were without effect. This conclusion makes it unnecessary to consider the effect of receiving payment in full of the loan upon licenses, or rights previously granted under the mortgage assignment. (*West v. Crary*, 47 N. Y. 423; *Waterman v. MacKenzie*, *supra*.)

Mr. Waterman's exclusive license was therefore in full force when the defendants made the fountain pens in question and stamped them with the name "Waterman's Ideal Fountain Pen." The existence of the letters patent furnished them no protection in thus using the name, because, as already appears, they had no right to manufacture or sell the patented article. The relief that the plaintiffs may be entitled to in the proper forum, on account of the making of fountain pens by the defendants, is not involved in this action, which relates not to the use of the invention but to the use of the name.

If our reasoning thus far is sound, but little difficulty remains in the way of pronouncing judgment in this appeal. With the patents eliminated from the case, as immaterial facts, it stands on the theory of the complaint, which makes no allusion to them. Thus we have a case where, in the language of this court in *Selchow v. Baker* (93 N. Y. 59, 69), "a manufacturer has invented a new name, consisting * * * of a word * * * in common use, which he has applied for the first time to his own manufacture, or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients or characteristics, but is arbitrary or fanciful and is not used merely to denote grade or quality."

While the word "fountain," as applied to pens of a certain kind is a common appellative, the word "ideal," as applied to fountain pens, is non-descriptive, arbitrary and fanciful and

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has no natural nor necessary application to a pen. It serves to indicate that the article sold by Waterman was of his own manufacture. The right to so use it was in the nature of property and had become valuable. The use of it by the defendants tended to deceive purchasers by inducing them to believe that the pens sold by them were made by one who had established the reputation of his wares by the superiority of his workmanship and the excellence of his materials. The result, being injurious to the public as well as to the plaintiffs, authorized a court of equity to interpose its preventive remedy for the protection of both the private right and the public interest by restraining the defendants from passing off wares of their own manufacture as those made by another. The ground of interference by the court is the false representation by the defendants through their acts in stamping the pens made by them with a word that has obtained currency as indicating pens made by Waterman. Even if, in so doing, they did not intend to defraud, as the necessary tendency of their acts was to deceive the public, the court was authorized to interfere. (*Newman v. Alvord*, 51 N. Y. 189; *Canal Co. v. Clark*, 13 Wall. 311; *Singer Mfg. Co. v. Wilson*, 24 Week. Rep. 1023; *Sykes v. Sykes*, 3 B. & Cr. 541; *Millington v. Fox*, 3 My. & Cr. 338; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94; *Singer Mfg. Co. v. Larsen*, 8 Biss. 151.)

In the case last cited, a patentee had established the name of the "Singer Sewing Machine." It was held that, although, after the expiration of the patent, the defendant could make that machine and call it by that name, still he could not "do any act, the necessary effect of which would be to intimate, or to make anyone believe that the machine which he constructs and sells, is manufactured by the plaintiff."

The function of a trade-mark is to point out the maker of the article to which it is attached. It individualizes the particular make of one who adopted the name for that purpose and with that effect. The defendants claim that the use by them of the name in question did not point out the maker, but the inventor, but we think it indicated both. "Waterman's Foun-

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tain Pen,” with the date of the patent following, pointed out the inventor, while the insertion of the word “Ideal,” together with the use made of it, pointed out the maker. The learned trial court found that Waterman, for a long time prior to the commencement of this action “had been the manufacturer and vendor of an article known as a fountain pen, which he had for many years * * * offered for sale, and sold, stamped and labeled with his own proper device and trade-mark, adopted by the plaintiff for that purpose in the year 1884, as follows: ‘Waterman’s Ideal Fountain Pen.’” Also that “it is known as such article to the public and to the buyers and consumers thereof” by that name “and by the plaintiff’s own proper device and trade-mark aforesaid.” As the name was also used to indicate the patented article, it performed the double function of identifying not only fountain pens as made by Mr. Waterman, but also as patented by him. Can this fact take anything from his rights, or add anything to those of the defendants? Cannot a patentee adopt the same name to designate his workmanship, as well as his invention? Assuming that, upon the expiration of the patent, anyone may use the name, until that time arrives why should the inventor be deprived of a right, which without question would be his if he had not taken out a patent for his invention?

We think that the word “Ideal,” as applied by Mr. Waterman to fountain pens of his own manufacture, comes within the comprehensive definition of a trade-mark as given in *Selchow v. Baker* (*supra*), and that the plaintiffs, as the owners of the name, are entitled to the protection which the law affords to owners of trade-marks, notwithstanding the fact that the name is also used to designate the invention. Upon the facts found, the plaintiffs were entitled to an injunction restraining the defendants from using the word “Ideal” as applied to fountain pens.

The judgment should, therefore, be reversed and a new trial granted, with costs to abide the final award of costs.

All concur, except BRADLEY, J., not voting.

Judgment reversed.

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HERMAN BASKIN et al., Appellants, v. HENRY HUNTINGTON, as
Executor, etc., et al., Respondents.

Under the provisions of the act of 1850 (Chap. 295, Laws of 1850) and the similar provision of the Code of Civil Procedure (§ 1380), providing that after one year from the death of a party against whom in his life-time a final money judgment had been rendered, the same "may be enforced by execution against any property upon which it is a lien," with like effect as if the judgment debtor was still living, no distinction is made between judgments upon sole, joint, or joint and several contracts, and the land of a deceased surety, against whom, as surety, a judgment has been recovered, and has become a lien upon said land in his life-time, is not excepted, and is not relieved from the lien by his death.

Where, therefore, prior to the death of one of the makers of a joint and several promissory note, who executed it as surety, judgment had been recovered against him thereon, and had become a lien upon his real estate, *held*, that the lien of the judgment was not discharged by his death, and was enforceable by execution issued as prescribed by the Code of Civil Procedure (§§ 1379, 1380, 1391); and this, although the judgment was recovered and the surety died before the going into effect of the provision of the Code (§ 758, as amended in 1877) declaring that the estate of a person jointly liable with others upon contract shall not be discharged by his death.

Reported below, 53 Hun, 95.

(Argued October 6, 1891; decided December 15, 1891.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made the first Tuesday of June, 1889, which reversed a judgment in favor of plaintiffs entered upon the report of a referee, and granted a new trial.

On February 22, 1875, Mary E. Huson as principal, and William R. Baskin and James L. Brewer as sureties, made their joint and several promissory note, by which they promised to pay John T. Andrews and James Huntington, or bearer, \$800, March 1, 1876, with interest. June 7, 1876, the payees in the note recovered a judgment thereon against the principal and sureties for \$854.33 damages and costs. When the judgment was entered, William R. Baskin owned land in the county of Yates on which the judgment became a lien. June 7, 1877 William R. Baskin died intestate, leaving the plaintiffs

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in this action, Lyman J. Baskin and Winifred E. Baskin, his children and only heirs at law and next of kin, and Eliza A. Baskin, his widow, who died November 21, 1879. Before this action was begun, the plaintiffs had succeeded to the interests of Lyman J. and Winifred E. Baskin, and now are the owners in fee of the lands of which William R. Baskin died seized. Whether he left personalty or whether letters of administration were issued on his estate does not appear. March 11, 1881, the plaintiffs in the aforesaid judgment (John T. Andrews and James Huntington) caused an execution to be issued thereon against the property of the defendants therein, and March 14, 1881, delivered it to Charles Bell, then the sheriff of the county of Yates. The referee finds that the execution directed the sheriff to collect the amount of the judgment, with interest, in which it differs from the allegation in the complaint, wherein it is averred he was directed to collect \$906.69, with interest on \$854.33, from January 10, 1880. The sheriff had a deputy by the name of R. Baskin, to whom he delivered the execution. December 31, 1882, the official term of Charles Bell as sheriff expired, since which he has not held the office of sheriff, nor has Baskin the office of deputy sheriff. From January 1, 1883, until December 31, 1885, Charles Speelman was sheriff of the county of Yates, and from January 1, 1886, to December 31, 1888, Michael Pearce was the sheriff of said county. August 8, 1885, James Huntington, one of the plaintiffs in said judgment, died, leaving a last will and testament, which was duly probated and letters testamentary issued thereon to Henry Huntington, who is now acting as executor of said will.

April 7, 1886, Charles Bell, as late sheriff, by R. Baskin, deputy, advertised that he would, pursuant to the aforesaid execution, sell May 22, 1886, all of the interest which William R. Baskin had in said land at the date of the recovery of the judgment. Mary E. Huson, the principal, and James L. Brewer, the co-surety, are insolvent.

On May 20, 1886, this action was begun to set aside the judgment and restrain the plaintiffs therein, the defendants

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herein, from selling the land of the plaintiffs under the execution. The case was tried before a referee on the pleadings and an admission (no evidence being given by either side) that William R. Baskin was a surety for Mary E. Huson on the note and had no part of its consideration. The counsel for the plaintiffs then moved for a judgment on the following grounds: (1) "That the defendant ex-sheriff Bell, who is seeking to enforce the judgment against the property of the plaintiffs, had not at the time he ceased to be sheriff of Yates county commenced the execution of the mandate or process by the collection of money thereon, or by seizure or levy upon money or other property by reason thereof." (2) "Upon the ground that by the death of William R. Baskin, his estate and lands of which he died seized are discharged from the judgment." (3) "That the judgment mentioned in the complaint has ceased to be a lien upon any lands of which William R. Baskin died seized."

The defendants moved to dismiss the complaint on the following grounds: (1) "That it does not state facts which constitute a cause of action." (2) "That all the-relief asked for in the complaint could have been obtained by motion, and that there was no necessity for a resort to an action." (3) "That the gravamen of the complaint is only such as would bind the defendant Andrews and in no way affects or charges James Huntington, the testator, or the defendant Henry Huntington, who is the executor of James Huntington." The referee overruled the motion of the defendants and granted the motion made in behalf of the plaintiffs, and thereupon signed a decision containing findings of fact and conclusions of law. He held that on the death of William R. Baskin, his estate was discharged from all liability on the judgment and directed a judgment vacating and setting aside the execution and restraining the defendants from thereafter attempting to enforce the payment of the judgment or execution.

John Gillette for appellants. The several note signed by Mary E. Huson, as maker, and William R. Baskin and J. L.

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Brewer, as sureties, was merged into a joint judgment, and was thereafter a joint obligation against them all. (*McNulty v. Hurd*, 18 Hun, 1; *Risley v. Brown*, 67 N. Y. 160; *Getty v. Buisse*, 49 id. 385.) Said note having been made, and such judgment obtained before the enactment and adoption of section 758 of the Code of Civil Procedure, the rights, relations and equities of the parties toward each other is to be determined by the rules prevailing at common law, and are not at all affected by such statutory provisions. (*Randall v. Sackett*, 77 N. Y. 480.) The death of a party to a note or other obligation, who signed or became liable thereon only as surety for another party or parties thereto, operates as an absolute discharge of the estate of such surety. (*Richardson v. Draper*, 87 N. Y. 344; *Getty v. Buisse*, 49 id. 385; *Randall v. Sackett*, 77 id. 480; *McNulty v. Hurd*, 18 Hun, 1; *McCluskey v. Cronwell*, 11 N. Y. 593; *Wood v. Fisk*, 63 id. 250.) The execution issued to enforce the judgment obtained and entered against the maker and sureties on the note in question, under the admitted facts in this case, had become absolutely void and of no effect in the hands of the defendant Charles Bell, and he had no power or authority to advertise or sell the lands of the plaintiff thereon, and as against him and the other defendants the plaintiffs were entitled to a judgment restraining them therefrom, even though the judgment was a valid lien thereon. (Code Civ. Pro. §§ 182, 1379, 1380, 1381; *Rodgers v. Bonner*, 45 N. Y. 384; *M. Bank v. Van Brunt*, 49 id. 160; *Wallace v. Swinton*, 64 id. 188; *Wadley v. Davis*, 30 Hun, 572; *Ward v. Craig*, 87 N. Y. 557; *Scott v. Morgan*, 94 id. 508; *E. C. F. Co. v. Hersee*, 103 id. 25, 27; *Halpin v. P. Ins. Co.*, 118 id. 165; *Travis v. Travis*, 122 id. 453.)

Martin J. Sunderlin for respondents. The defendants' motion to dismiss the complaint should have been granted by the referee, and the exception thereto is well taken. (4 Wait's Pr. 29; *Vilas v. Chase*, 19 Civ. Pro. Rep. 339; Code Civ. Pro. § 1251; *Bond v. Willett*, 1 Keyes, 377; *Wood v. Colvin*, 5 Hill, 228; *Van Gelder v. Van Gelder*, 26 Hun, 356; *Jack-*

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son v. Collins, 3 Cow. 89; *Jackson v. Tuttle*, 9 id. 233, 239; *People ex rel. v. Baker*, 20 Wend. 602, 604.) The effect of the death of a surety in a joint obligation, at the time of the death of William R. Baskin, was only to relieve his personal estate and personal representatives from an action or legal proceeding to collect the indebtedness incurred therefrom. (*United States v. Price*, 9 How. [U. S.] 83, 91, 96; *Getty v. Binnse*, 49 N. Y. 385; *Wood v. Fisk*, 63 id. 245; *Risley v. Brown*, 67 id. 160; *Johnson v. Harvey*, 84 id. 363; *Richardson v. Draper*, 87 id. 337, 344; *Smith v. Osborne*, 31 Hun, 390.) The death of the surety never discharged a lien actually obtained upon his real estate previous to his death, by judgment, mortgage, or otherwise, and it could be enforced by execution thereafter. (Gorham's Pr. [2d ed.] 806-815; Code Civ. Pro. §§ 1251, 1380, 1381, 1983; *Adams v. I. Nat. Bank*, 116 N. Y. 606; *Wood v. Colvin*, 5 Hill, 228; *Borst v. Cory*, 15 N. Y. 510; *Pratt v. Higgins*, 29 Barb. 282; *Gillett v. Smith*, 18 Hun, 10; *Mayor, etc., v. Colgate*, 12 N. Y. 148.) The liability or obligation of two or more debtors against whom a judgment is recovered by the personal service of a summons or appearance therein is not joint, but joint and several. (Code Civ. Pro. §§ 1369, 1932-1935; *Lahey v. Kingon*, 22 How. Pr. 209; *Niles v. Batteshall*, 27 id. 381; *Pr. Bank v. Morton*, 67 N. Y. 199; *J. L. & S. O. Co. v. Hubbell*, 76 id. 545, 546.)

FOLLETT, Ch. J. By statute a judgment becomes a lien on the land of a judgment debtor which is within the county wherein the judgment is docketed (2 R. S. 359, § 3, which is superseded by Code C. P. § 1251), and a mode for enforcing the lien after the death of the judgment debtor is provided. (Code C. P. §§ 1252, 1379, 1380, 1381.) Section 1380 provides: "After the expiration of one year from the death of a party against whom a final judgment for a sum of money, or directing the payment of a sum of money, is rendered, the judgment may be enforced by execution against any property upon which it is a lien, with like effect as if the judgment

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debtor was still living.” This provision was taken from section one, chapter 295 of the Laws of 1850, so that it was a part of the statute law of this state when the obligation upon which the judgment was recovered was given. No distinction is made in the statute between judgments recovered on sole, on joint, or on joint and several contracts; nor is there any exemption of the land of a deceased surety contracting jointly and severally with a principal, and against both of whom a judgment has been recovered. The judgment was recovered, and William R. Baskin died before section 758 of the Code of Civil Procedure took effect.

The rule that a judgment recovered against two or more joint contractors may be enforced against the land of one of the debtors who has died, and upon which it has become a lien, is recognized or declared in the following cases: *Trethewy v. Ackland* (2 Saund. 48, see note); *Reed v. Garvin* (7 S. & R. 354); *Commonwealth v. Mateer* (16 id. 416); *Stiles v. Brock* (1 Pa. St. 215).

In the case last cited it was said: “Now, that one of two joint debtors dying, is thereby discharged, both in person and estate, at law from the payment of a debt, is too well established to be controverted, unless the debt became a lien on his estate in his life-time, in which latter case the property on which the lien existed may be taken to satisfy the debt.”

We are not called upon to determine whether the judgment which the defendants are seeking to enforce against the realty on which it became a lien can be collected out of the other property of the deceased surety, for no such attempt has been made. It is unfortunate that the record does not show whether this execution was issued pursuant to sections 1379, 1380 and 1381 of the Code of Civil Procedure, and also that it does not disclose whether the sheriff had begun to execute the execution by the collection of money thereon, as provided by sections 184 and 186 of the Code Civ. Pro. The record does not enable us to determine whether the execution is a legal one, nor, if it is, whether the defendant, ex-Sheriff Bell, is in a position to make a valid sale by virtue of it. Whether a purchaser can acquire

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title under a sale made under this process by the ex-sheriff, must be left undetermined until the question arises and the necessary facts are before the court.

The order should be affirmed and judgment absolute rendered against the appellants, with costs.

All concur.

Order affirmed and judgment accordingly.

GEORGE W. SMITH et al., Appellants, v. WILBUR H. PROCTOR et al., Trustees, etc., Respondents.

Under the provision of the act consolidating the acts in reference to public instruction (§ 19, chap. 555, Laws of 1864, as amended by chap. 567, Laws of 1875, and chap. 528, Laws of 1881), which provides that "whenever a majority of all the inhabitants of any school district entitled to vote, to be ascertained by taking and recording the ayes and noes of such inhabitants attending" a school meeting, shall determine that a sum required for building a new school-house shall be raised by installments, the same may be so raised, and authorizes the trustees of the district to borrow so much of the sum voted as may be necessary, and to issue bonds therefor, a majority of the qualified voters of the district is not required, nor is a majority of those at a school meeting; the statute simply requires a majority of the qualified voters in attendance, pursuant to legal notice, who actually vote upon the question by answering "aye" or "no" as the names of all present are called.

Where, therefore, it appeared that the number of qualified voters in a school district was three hundred, that at a school meeting, of which due notice had been given, which was attended by one hundred and fifteen of such voters, a resolution authorizing the raising of a sum to be expended in building a new school-house, and directing the trustees to issue district bonds to the amount specified, payable in installments, was adopted by a vote of thirty-four ayes to thirty-three noes, the other voters present not voting, *held*, that the resolution was legally adopted; and so, that an action to restrain the issuing of the bonds or the collection of a tax to pay interest thereon was not maintainable.

(Argued November 30, 1891; decided December 15, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

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made October 25, 1889, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was brought by certain taxpayers of school district number two of the town of Newtown, Queens county, against the defendants, as the trustees and the collector of said district, to restrain said trustees from issuing bonds for the erection of a new school-house in accordance with a resolution adopted at a district meeting, and to restrain said collector from collecting a tax already levied for the purpose of paying one year's interest on such bonds.

The facts, so far as material, appear in the opinion.

John E. Parsons for appellant. The proceeding rests wholly upon the statute, is in derogation of the common law, and affects the rights and property of individuals. The statute must be strictly pursued. (*Town of Solon v. W. S. Bank*, 114 N. Y. 122, 130; *Rich v. Keyser*, 54 Penn. St. 86; *P. R. T. Co. v. Dash*, 125 N. Y. 93; *State of Missouri v. Winkelmeier*, 35 Mo. 103.) It is the policy of the law in this state to give effect to provisions intended for the protection of municipalities against any attempt by a small minority of inhabitants to create indebtedness. (*Starin v. Town of Genoa*, 23 N. Y. 439; *Gould v. Town of Sterling*, Id. 456; *Town of Venice v. Woodruff*, 62 id. 462; *People ex rel v. Allen*, 52 id. 538; *Town of Springport v. Savings Bank*, 75 id. 397; *Town of Solon v. W. S. Bank*, 114 id. 122; *Walnut v. Wade*, 103 U. S. 683; *Carroll County v. Smith*, 111 id. 556; *County of Cass v. Johnston*, 95 id. 360; *Rich v. Town of Mentz*, 134 id. 632.)

M. D. Gould for respondents. Section 19, article 2, title VII, of the General School Laws requires the vote of a majority of the electors present and voting only, and not a majority of all the legal voters of the district. (2 Burr. 1021; 7 Ad. & El. 454.)

Opinion of the Court, per VANN, J.

VANN, J. The only question brought before us by this appeal is whether the resolution to bond the district was adopted by a majority of the qualified voters, within the meaning of the statute governing the subject.

The trial court found that there were three hundred residents of the district entitled to vote at school meetings at the time the resolution was adopted, and that all of them had been duly notified of the meeting and its purposes, which included, by specific mention, the voting of "a tax to be raised by installments * * * to be expended in the erection of" a new school-house. At a meeting held only a few days before it had been determined, by a vote of sixty-nine to forty-seven, that it "was advisable to erect a new school building," and a committee was thereupon appointed to procure information respecting the site, cost, etc., with instructions to report at a future meeting. An adjournment was then taken, and on the adjourned day, one hundred and fifteen voting inhabitants were present, when the resolution in question was adopted by a vote of thirty-four for, to thirty-three against the same, only sixty-seven having voted upon the question.

The statute regulating the course to be pursued in order to issue valid bonds is as follows:

"Whenever a majority of all the inhabitants of any school district entitled to vote, to be ascertained by taking and recording the ayes and noes of such inhabitants attending at any annual, special or adjourned school district meeting, legally called or held, shall determine that the sum proposed and provided for in the next preceding section shall be raised by installments, it shall be the duty of the trustees of such district, and they are hereby authorized to cause the same to be raised, levied and collected in equal installments in the same manner and with the like authority that other school taxes are raised, levied and collected, and * * * whenever a tax shall have been voted to be collected in installments for the purpose of building a new school-house, to borrow so much of the sum voted as may be necessary at a rate of interest not exceeding six per cent, and to issue bonds or other evidences of indebtedness

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therefor, which shall be a charge upon the district and be paid at maturity, and which shall not be sold below par." (L. 1864, c. 555, p. 1245, § 19 ; L. 1875, c. 567, p. 642, § 18 ; L. 1881, c. 528, p. 706, § 2.)

As the thirty-four electors who voted in favor of the proposition were less than a majority of the one hundred and fifteen qualified voters who attended the meeting, it is contended in behalf of the plaintiffs that the resolution did not receive the majority required by statute, and hence that the trustees were without lawful authority to issue the bonds. The argument is conclusive, unless the legislature has provided some means of ascertaining a majority of the legal voters other than a simple enumeration of all the qualified voters of the district, or even of all who attended the meeting.

An analysis of the statute suggests the inquiry whether it requires a majority of all entitled to vote, or a majority of all present and entitled to vote, or a majority of all present and entitled to vote and actually voting? The answer to this question is to be found in the words "to be ascertained," as used in the statute. What is to be ascertained? Obviously, the majority required to make the determination. How is it to be ascertained? The statute answers: "By taking and recording the ayes and noes of such inhabitants attending;" that is, as attend the meeting. How is a vote by ayes and noes taken and recorded? By calling the names of those present and recording such as vote "aye" as in favor of and such as vote "no" as opposed to the pending resolution. As those who do not vote cannot be recorded as voting, the majority must be determined by comparing the number of those who vote "aye" with the number of those who vote "no." Those who did not vote at all cannot be recorded as voting "no," because they did not vote "no," and to so record them would falsify the record. When a vote is taken under a statute which provides that a majority is to be ascertained by taking and recording the ayes and noes of those present at the meeting, we think that those who do not respond as their names are called should not be counted at all, and that cer-

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tainly they should not be counted as if they had voted "no." The rule of the common law pertaining to the subject, as declared by Lord MANSFIELD, is that "whenever electors are present and do not vote at all, they virtually acquiesce in the election made by those who do;" (*Oldknow v. Wainwright*, 2 Burr. 1017, 1021); and by Lord DENMAN, that a vote by a majority of a meeting means "a majority of those who choose to take a part in the proceedings of the assembly." (*Gosling v. Veley*, 7 Ad. & Ell. [N. R.] 406, 456.)

The language of the Supreme Court of the United States in a recent case has a bearing upon the subject. Speaking through its chief justice, that learned court said that "all qualified voters, who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares." (*County of Cass v. Johnston*, 95 U. S. 360, 369.) For many years it has been the established policy of the state to cherish common schools, and for this purpose it annually expends large sums of money. The statute, of which the section under consideration forms a part, is an elaborate and comprehensive act, designed to furnish instruction free of expense to all the children in the state. Great care is taken to provide for the erection of suitable buildings for school purposes, and if a district needs a new school-house and will not voluntarily build one, agencies are provided by which it may be compelled to build one, even against the wishes of a majority of the taxpayers. (L. 1887, c. 592, p. 805, § 1.) The statute should receive a reasonable construction, keeping in view its general purpose to promote the efficiency of the common schools. It would not be reasonable to hold that the majority required is an absolute majority of all the qualified voters of the district, because the statute does not so command, and, on that basis, it would be difficult, if not impossible, to tell whether a resolution had been carried or not. No enumeration or registration of voters is provided for, and the qualifications of persons entitled to vote at school meetings differ materially from those of electors at general elections.

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Hence a dangerous question of fact would always be open, and the value of the bonds would be seriously affected thereby. Prudent men would hesitate before investing in securities resting on such a precarious foundation.

So, as we think, it would be unreasonable to hold, in the absence of an express provision to that effect, that a majority is required of all who were present at the meeting, whether they voted or not, as this also might leave the result uncertain and invite controversy. By following the plain language of the statute and ascertaining a majority by comparing the affirmative and negative votes as actually given and recorded, these difficulties are avoided and the beneficent aim of the legislature is accomplished. This is the construction which has been uniformly given to the section under review by the department of public instruction, and is in accordance with the general usage that has followed its rulings. (Code of Public Instruction, p. 263.) It does not permit the absent or indifferent to neutralize the efforts of the public spirited and enterprising, but compels everyone, who would make his influence effective, to attend the meeting and vote in the manner provided by law.

In order to adopt a resolution such as that under consideration, the statute, as we interpret it, requires simply a majority of the qualified voters in attendance, pursuant to legal notice, who actually vote upon the question submitted by answering "aye" or "no," as the names of all present are called.

We think that the complaint was properly dismissed, and that the judgment appealed from should be affirmed, with costs.

All concur, except PARKER, J., dissenting.

Judgment affirmed.

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HENRY H. DuBois, Respondent, v. WILLIAM M. DECKER,
Appellant.

A physician and surgeon engages to bring to the treatment of his patient, care, skill and knowledge, and while, when exercising these, he is not responsible for mere errors in judgment, he is chargeable with knowledge of the probable consequence of an injury, or of neglect in its treatment, or unskillful treatment.

When a liability for negligence or malpractice is established, proof that the patient, after the liability was incurred, disobeyed the orders of the physician and so aggravated the injury, does not discharge the liability; it simply goes in mitigation of damages.

Where an indigent person, having met with an accident, was taken to an alms-house, and was treated and attended there by a physician employed and paid by the public, *held*, that it was no defense, in an action for malpractice, that he was not employed by, and that there was no contract relations between, him and plaintiff.

It seems, the fact that a physician or surgeon renders his services gratuitously does not absolve him from the duty to exercise reasonable and ordinary care, skill and diligence.

(Argued December 1, 1891; decided December 15, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made March 16, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

A. T. Clearwater for appellant. The denial of the motion for a nonsuit was error. The entire evidence has been incorporated in the case on appeal, and taken altogether it was insufficient to justify the submission of the cause to the jury, or to sustain the verdict. (Whart. on Neg. §§ 733, 737; S. & R. on Neg. §§ 434, 435, 437, 439, 440, 442; *Rich v. Pierpont*, 3 F. & F. 35.) The plaintiff was guilty of contributory negligence. (*Hibbard v. Thompson*, 109 Mass. 286; Whart. on Neg. § 737; S. & R. on Neg. § 37; *Curran v. W. C. & M. Co.*, 36 N. Y. 153; *Wood v. Andes*, 11 Hun, 543;

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2 Thompson on Neg. 1216; *Geiselman v. Scott*, 25 Ohio St. 86; *McCandless v. McWha*, 22 Penn. St. 261; *Haire v. Reese*, 7 Phila. 138.) The declaration must show a duty, and the particular contract or particular duty from which the liability results. But to state merely that it was the defendant's duty to do so and so, if it do not appear from the other facts stated that it was his duty, is not sufficient. (*City of Buffalo v. Holloway*, 7 N. Y. 493.) The learned trial court further erred in refusing to charge as requested by the defendant. "Defendant asks the court to charge that as defendant treated the plaintiff gratuitously he is liable, if at all, only for gross negligence." (S. & R. on Neg. § 432; *Owen v. H. R. R. Co.*, 35 N. Y. 516; *Bonney v. B. R. R. Co.*, 1 How. [U. S.] 66.) The court erred in overruling the objection of the defendant to the admission of the testimony as to his dancing the racket. (*Wehle v. Haviland*, 42 How. Pr. 399; 4 Daly, 550.) In actions of negligence where evidence bearing with directness and force upon the liability of the defendant has been erroneously admitted or evidence tending to show contributory negligence upon the part of the plaintiff, improperly excluded, a new trial must be granted, even although there be unobjectionable evidence sufficient to sustain the verdict. (*Baird v. Gillett*, 47 N. Y. 186; *Strohn v. N. Y., L. E. & W. R. R. Co.*, 96 id. 305; *Anderson v. R., W. & O. R. R. Co.*, 5 N. Y. 334; *Hawley v. Hatter*, 9 Hun, 134; *Cropey v. Perry*, 1 How. [U. S.] 40; *Waring v. U. S. T. Co.*, 4 Daly, 233; *O'Hagan v. Dillon*, 76 N. Y. 170; *William v. Fitch*, 18 id. 546; *McPhillips v. N. Y., N. H. & H. R. R. Co.*, 12 Daly, 365; *Hallgarten v. Eckert*, 67 Barb. 59.)

Samuel T. Hull for respondent. This court has no power to review the determination of the General Term in affirming the order denying the motion for a new trial made upon the judge's minutes and on the grounds that the verdict was against the evidence. (*Duryea v. Vosburgh*, 121 N. Y. 57.) The questions involved in this case were questions of fact for the

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jury, and they have found against the defendant thereon, and a judgment entered upon their verdict upon questions of fact will not be disturbed by the appellate court. (*Green v. Fortier*, 80 N. Y. 640; *Oldfield v. N. Y. C. & H. R. R. Co.*, 14 id. 310.) The motion to dismiss the complaint was properly denied by the trial court. (*Zabriskie v. Smith*, 13 N. Y. 322; *Marie v. Garrison*, 83 id. 23; *Neftel v. Lightstone*, 77 id. 96, 99; *Connaughty v. Nichols*, 42 id. 83; *Ledwich v. McKin*, 53 id. 307; *Graves v. Waite*, 59 id. 156.) When there is a general objection to evidence and it is overruled and the evidence is received, the rulings will not be held erroneous unless there be some grounds which could not have been obviated had they been specified, or unless the evidence in its essential nature be incompetent. The defendant having failed to specify any such ground upon the trial, he is not in position to urge the same upon this appeal. (*Bergman v. Jones*, 94 N. Y. 51, 58; *Quimby v. Stauss*, 90 id. 664; *Daly v. Byrne*, 77 id. 182, 187; *Levin v. Russell*, 42 id. 251, 255; *People v. Beach*, 87 id. 508; *Beir v. Cooke*, 37 Hun, 38; *Fountain v. Petter*, 38 N. Y. 184; *Crosby v. Day*, 81 id. 242; *Ward v. Kilpatrick*, 85 id. 417; *Chester v. Dickerson*, 54 id. 13.) The exclusion of competent testimony is cured by its subsequent admission. (*Fountain v. Petter*, 38 N. Y. 184.) When after the evidence of a witness as to a matter is excluded, the same witness is allowed to testify fully in reference thereto, this obviates the error, if any, in the prior ruling. (*In re Crosby v. Day*, 81 N. Y. 242.) There was no ground of objection to the question: Did you have any talk with Dr. C. W. Crispell in regard to the injury? (*Briggs v. Waldron*, 83 N. Y. 582.) A surgeon having adopted a process which was not successful, to the exclusion of one which might and probably would have proved so, is not entitled to the benefits which would inure to the skillful surgeon from an error of judgment or mistake. (*Carpenter v. Blake*, 50 N. Y. 696; *Stearns v. Field*, 90 id. 641; *Filer v. N. Y. C. R. R. Co.*, 49 id. 42; *Cowley v. People*, 83 id. 464; *Harnet v. Garvey*, 66 id. 641.) The opinion of a medical man upon the cause of death, the

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cause or effect of an injury, the effect of a medicine or a particular treatment is admissible. (*Wright v. Hardy*, 2 Wis. 334; *Mayo v. Wright*, 63 Mich. 32.) Even if some of the questions asked were too broad, the answers having been limited to the points at issue, there was no error. (*Wright v. Cabot*, 89 N. Y. 570.) The motion for a nonsuit and the request to direct a verdict for the defendant were properly denied, the questions in the case being peculiarly questions of fact for the jury, and the motion for a nonsuit having only been made *pro forma*. (*Boldt v. Murray*, 2 N. Y. S. R. 232, 234.) The defendant asked the court to charge: "That if plaintiff did not obey defendant's instructions, and this contributed to an aggravation to the injury, the plaintiff cannot recover." The court declined to charge it in the form in which it was put, and the ruling was proper. (*Carpenter v. Blake*, 60 Barb. 488; 50 N. Y. 696; 75 id. 12; *Schile v. Brokhaus*, 80 id. 614; *Gould v. McKenna*, 86 Penn. St. 297; *McCandless v. McWha*, 22 id. 261.) The fact that a physician or surgeon renders services gratuitously, does not affect his duty to exercise reasonable and ordinary care, skill and diligence. (*McNevins v. Lowe*, 40 Ill. 209; *Gladwell v. Steggall*, 5 Bing. [N. C.] 733; *Nugent v. B., C. & M. R. R. Co.*, 80 Me. 62; *Bennett v. Whitney*, 94 N. Y. 302, 306; *Hover v. Barkhoof*, 44 id. 113.) If the court has already charged the law as to the material questions involved, it is not error to decline to charge abstract propositions submitted by counsel. (*Moody v. Osgood*, 54 N. Y. 488; *Algur v. Gardiner*, 54 id. 360, 364; *Carpenter v. Blake*, 60 Barb. 488, 519; 50 N. Y. 696.) The law implies that surgeons and physicians, in the treatment of all the cases they undertake, will have and exercise reasonable and ordinary skill, care and diligence, and give attention proportionate to the delicacy and importance of the operation and case. (*Carpenter v. Blake*, 60 Barb. 489; 50 N. Y. 696; 75 id. 12; *Bellinger v. Craigne*, 31 Barb. 534; *Holtzman v. Hoy*, 118 Ill. 534.) The defendant having admitted by his own testimony that he had not had experience in surgery sufficient to justify his attempt to treat the plaintiff,

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cannot avail himself of the defense that he acted according to his best skill and judgment. (Wood on Master and Servant, 330, 331.) The question as to whether there was want of skill or negligence on the part of the defendant was for the jury, and the jury, upon abundant evidence thereof, have found against the defendant, and he is concluded by their verdict. (*Boldt v. Murray*, 2 N. Y. S. R. 232; *Hagman v. H. L. Im. Co.*, 50 N. Y. 53, 55; *Maher v. C. P. & C. R. R. Co.*, 67 id. 52, 55; *Downs v. N. Y. C. R. R. Co.*, 56 id. 664; *Hamilton v. T. A. R. R. Co.*, 53 id. 25; *Green v. Fortier*, 80 id. 640.)

HAIGHT, J. This action was brought to recover damages of the defendant a physician and surgeon, for alleged malpractice suffered by the plaintiff whilst undergoing treatment as a patient.

On the 1st day of December, 1889, the plaintiff undertook to jump onto an engine of the Ulster and Delaware railroad, in the city of Kingston, and in doing so slipped, and his left foot was caught by the tender, and a portion thereof crushed. Being destitute he was taken to the city alms-house, where he was treated by the defendant, who was one of the city physicians having the care of the patients therein, and who was employed for that purpose. Thereafter, and on the tenth day of December, he amputated the plaintiff's leg above the ankle joint, and six or seven days thereafter, gangrene having set in, he again amputated the leg at the knee joint. After the second amputation the leg did not properly heal, but became a running sore, and at the time of the trial the bone protruded some three or four inches.

Evidence was given upon the trial from which the jury might find that the bones of the foot were so crushed that immediate amputation of the injured portions was necessary, and that the appearance of gangrene was in consequence of the delay of ten days in the operation; and that in the second operation the defendant neglected to save flap enough to cover the end of the limb and bone, and that the subsequent protrusion of the bone was owing to this neglect.

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The question of defendant's liability consequently became one for the jury. We are aware that he claimed to have waited ten days before operating, for the purpose of seeing whether the foot could not be saved, and that a physician and surgeon will not be held liable for mere errors in judgment. But his judgment must be founded upon his intelligence. He engages to bring to the treatment of his patient care, skill and knowledge, and he should have known the probable consequences that would follow from the crushing of the bones and tissues of the foot.

In submitting the case to the jury, the defendant asked the court to charge that "if the plaintiff did not obey the defendant's instructions and this contributed to an aggravation of the injury, the plaintiff cannot recover." The court declined to charge in the form in which the request was put, and an exception was taken by the defendant.

It appears from the testimony of the defendant that after the second amputation he dressed the stump and put the plaintiff in position by elevating the limb so as to prevent hemorrhage and too much pressure upon the arteries; that the plaintiff did not keep in the position in which he was placed and got his leg to bleeding, and that he presumed that this bleeding interfered with the healing of the limb. It also appears that sometime after the second amputation the plaintiff refused and neglected to take the medicine that was left for him by the defendant, and that subsequently, after the defendant had ordered him to be removed to another room so as to avoid liability of contracting erysipelas from a patient that had been brought to the alms-house afflicted with that disease, he left and went away.

Whilst the removing of the limb from the position in which it was placed may have produced the bleeding and thus to some extent impeded the healing, and his going away at the time that he did may also have further aggravated the difficulty, these facts would only tend to mitigate the damages and would not relieve the defendant from the consequence of previous neglect or unskillful treatment. As to the prescrip-

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tion we are not told what it was or what it was for, and the jury was, therefore, unable to determine whether or not the condition of the patient would have been materially changed by its use.

The request to charge, as we have seen, was to the effect that if the plaintiff did not obey the instructions, and this contributed in aggravation of the injury, the plaintiff cannot recover. This was too broad if the jury found that the defendant was guilty of malpractice prior to the disobedience complained of.

In the case of *Carpenter v. Blake* (75 N. Y. 12), the court was requested to charge that if the plaintiff was guilty of any negligence in the management of the arm through or without the fault of the attending surgeon after the defendant ceased to have charge of the case, and such negligence contributed in any material degree to produce the present bad condition of the arm, the defendant was not responsible. This request was refused, and it was held properly for the reason that the request was too broad; that if there had been subsequent negligence, the cause of action for defendant's negligence would simply go in mitigation of damages.

In the case of *McCandless v. McWha* (22 Pa. St. 261-272), LEWIS, J., in delivering the opinion of the court, says: "A patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment be such as a surgeon of ordinary skill would adopt or sanction; but if it be painful, injurious and unskillful, he is not bound to peril his health and perhaps his life by submission to it. It follows that before the surgeon can shift the responsibility from himself to the patient on the ground that the latter did not submit to the course recommended, it must be shown that the prescriptions were proper and adapted to the end in view. It is incumbent on the surgeon to satisfy the jury on this point, and in doing so he has the right to call to his aid the science and experience of his professional brethren. It will not do to cover his own want of skill by raising a mist out of the refractory disposition of the patient."

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The defendant moved to dismiss the complaint upon the ground that it failed to show a contract relation between the parties whereby the defendant was employed to attend the plaintiff, and that no facts were alleged showing it to be the duty of the defendant to treat him in a skillful manner. This motion being denied, the defendant asked the court to charge that as the defendant treated the plaintiff gratuitously, he is liable, if at all, only for gross negligence; which was refused.

It has been held that the fact that a physician or surgeon renders services gratuitously does not affect his duty to exercise reasonable and ordinary care, skill and diligence. (*McCandless v. McWha*, 22 Pa. St. 261-269; *McNevins v. Lowe*, 40 Ill. 209; *Gladwell v. Steggall*, 5 Bing. [N. C.] 733.)

But we do not deem it necessary to consider or determine this question for it appears that the plaintiff's services were not gratuitously rendered. He was employed by the city as one of the physicians to attend and treat the patients that should be sent to the alms-house. The fact that he was paid by the city instead of the plaintiff did not relieve him from the duty to exercise ordinary care and skill.

Exceptions were taken to the admission and rejection of evidence. We have examined them and find none that require a new trial.

The judgment should be affirmed, with costs.

All concur, except PARKER, J., not sitting.

Judgment affirmed.

SOPHIE E. MINTON, Respondent, v. THE NEW YORK ELEVATED
RAILROAD COMPANY et al., Appellants.

In 1878 S. executed and delivered to W. a conveyance of certain premises, absolute in form, but which were in fact intended by the parties as collateral security for advances made by W. to S. In 1882 W., at the request of S., conveyed said premises to plaintiff, who assumed a mortgage thereon and paid the balance of the purchase-price in cash, which was the full value of the premises, and S. received the benefit thereof. Plaintiff had no actual notice that the deeds to W. were intended as security

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only. The premises were at the time of the conveyance in the possession of S. through his tenants, and plaintiff failed to inquire of them as to the title under which they held. Possession was surrendered to plaintiff after her purchase, and she continued in possession thereafter. In an action to recover damages for injuries from the maintenance of an elevated railroad in front of said premises, and to restrain its future maintenance and operation, S. testified that the conveyance to plaintiff was made with his consent, and that his debt to W. had been paid. The court found that plaintiff has, since the conveyance to him, been seized of an estate of inheritance in fee simple absolute in said premises, and through his agents and servants been in possession of the same. *Held*, no error; that plaintiff's failure to make inquiry of the tenants did not, under the circumstances, affect his position as *bona fide* purchaser; that the general rule that possession is notice to the person proposing to purchase of the rights of the occupant did not apply; also, that S. was estopped from asserting or maintaining any claim to the title, or right to redeem.

(Argued October 18, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 6, 1890, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This was an action to recover damages accruing for the maintenance of an elevated railroad in front of plaintiff's premises in the city of New York, and to restrain its future maintenance and operation.

The facts, so far as material, are stated in the opinion.

Samuel Blythe Rogers for appellants. It was error to find that plaintiff was seized of an estate of inheritance in fee simple absolute in the premises involved in this suit. (*Helcker v. Reinheimer*, 105 N. Y. 470; *Hughes v. M. E. R. Co.*, 25 J. & S. 379; *Ensign v. Ensign*, 120 N. Y. 655, 656; *Odell v. Montross*, 68 id. 504; *Carr v. Carr*, 52 id. 258; *Horn v. Keteltas*, 46 id. 605; *Murray v. Walker*, 31 id. 399; *Shattuck v. Bascom*, 105 id. 39; *Barry v. Ins. Co.*, 110 id. 1; *Taylor v. Post*, 30 Hun, 454; *McBurney v. Wellman*, 42 Barb. 390; *Tibbs v. Morris*, 44 id. 138; *Marks v. Pell*, 1 Johns. Ch.

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594; *Strong v. Stewart*, 4 id. 167; *James v. Johnson*, 6 id. 417; *Henry v. Davis*, 7 id. 42; *Clark v. Henry*, 2 Cow. 324; *Whittick v. Kane*, 1 Paige, 202; *Slee v. M. Co.*, 1 id. 48; *Van Buren v. Olmstead*, 5 id. 9; *Holmes v. Grant*, 8 id. 243; *McIntyre v. Humphreys*, Hoff. 31; *Robinson v. Cropsey*, 2 Edw. Ch. 138; *Brown v. Dewey*, 1 Sand. Ch. 57; *Wright v. Bates*, 13 Vt. 341; *Palmer v. Guernsey*, 3 Wend. 248; *Douglas v. Culverwell*, 4 DeG., F. 20; Coote on Mort. [4th ed.] 22; Jones on Mort. §§ 241, 309; *Runyan v. Mersereau*, 11 Johns. 534; *Hitchcock v. Harrington*, 6 id. 290; *Coles v. Coles*, 15 id. 513; *Edwards v. Wray*, 12 Fed. Rep. 42; *Wright v. Wood*, 23 Penn. St. 120; *Sailor v. Hertzog*, 4 Whart. 259; *Hood v. Fahnestock*, 1 Penn. St. 470; *Kerr v. Day*, 14 id. 112; *Hanley v. Morse*, 32 Me. 287; *Vezio v. Parker*, 23 id. 171; *Cunningham v. Pattee*, 99 Mass. 248; *Dickey v. Lyon*, 19 Ia. 544; *Nelson v. Wade*, 21 id. 47; *Pritchard v. Brown*, 4 N. H. 397, 404; *Halsey v. Martin*, 22 Cal. 645; *Kuhn v. Rumpp*, 46 id. 299; *French v. Burns*, 35 Conn. 359; *Dutton v. Warschaner*, 21 Cal. 628; *O'Rourke v. O'Connor*, 39 id. 442; *Thompson v. Pioche*, 44 id. 508; *Putnam v. Gaty*, 10 Ill. 186; *Franz v. Orton*, 75 id. 100; *M. Bank v. Godfrey*, 23 id. 579, 607; *Haworth v. Taylor*, Saxt. N. J. Eq. 441; *Shapley v. Abbott*, 42 N. Y. 443; *Knettle v. Newcomb*, 31 Barb. 169; *Crawford v. Lockwood*, 9 How. Pr. 547; *N. Y. & O. R. Co. v. Van Horne*, 57 N. Y. 473; *Brewster v. Striker*, 2 id. 19; *Chatfield v. Simonson*, 92 id. 209; *Norton v. Coons*, 6 id. 42; *Hartley v. Tatham*, 2 Abb. Ct. App. Dec. 333; *Nichols v. Nusbaum*, 10 Hun, 214; *Wilcox v. Howell*, 44 N. Y. 403; *Storrs v. Baker*, 6 Johns. Ch. 166; *Tilton v. Nelson*, 27 Barb. 595.) It was error to deny the defendants' demand for a jury trial of the cause of action for money damages for past trespasses. (*Colman v. Dixon*, 50 N. Y. 572, 574; *People v. A. & S. R. Co.*, 57 id. 161, 174; *McKeon v. See*, 51 id. 300, 305, 306; *Wheelock v. Lee*, 74 id. 495, 500; *Davis v. Morris*, 36 id. 569, 572; *Hudson v. Carye*, 44 id. 553; *Kempshall v. Stone*, 5 Johns. Ch. 193; *Barlow v. Scott*, 24 N. Y. 40, 45, 46; *Sternberger v. McGov-*

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ern, 56 id. 12, 21; *Murray v. Hay*, 1 Barb. Ch. 59; *Cogswell v. N. Y. C. & H. R. R. Co.*, 105 id. 319; *Shepard v. M. R. Co.*, 117 id. 442; Code Civ. Pro. §§ 791, 792; *Phillips v. Thompson*, 1 Johns. Ch. 131.) It is urged by plaintiff that a jury trial was waived by our failure to have issues framed under section 970 of the Code. This is untenable. (Code Civ. Pro. § 1009; *Waller v. Harris*, 20 Wend. 555; *McManus v. Gavin*, 77 N. Y. 36; *W. Cemetery v. P. P. & C. I. R. Co.*, 68 id. 591; Endlich on Inter. Stat. § 183.)

G. Willett Van Nest for respondent. The plaintiff is seized of the premises in suit as found by the court. (1 R. S. 756; 4 id. [8th ed.] 2470, § 2; *Dean v. M. E. R. Co.*, 119 N. Y. 550; *Ensign v. Ensign*, 120 id. 655; *Cadman v. Peter*, 118 U. S. 80; *Erwin v. Curtis*, 43 Hun, 292-294; *Shattuck v. Bascan*, 28 N. Y. S. R. 333; *Westfall v. Westfall*, 16 Hun, 541; *Bloomer v. Henderson*, 8 Mich. 495; *Woods v. Farmere*, 7 Watts, 384; *Scott v. Gallagher*, 14 S. & R. 333; *Newhall v. Pierce*, 5 Pick. 450; *Pope v. Allen*, 90 N. Y. 300; *Trenton v. Duncan*, 86 id. 230; 2 Waterman on Trespass, 346, § 909; *Wilson v. Hinsley*, 13 Md. 71, 73; *Harker v. Birkbeck*, 3 Burr, 1563; *Thorean v. Pallies*, 1 Allen, 426; *Catteris v. Conjer*, 4 Taunt. 547; *Rood v. N. Y. & E. R. Co.*, 18 Barb. 80; *Sweetland v. Stetson*, 115 Mass. 49; *Hunt v. Rich*, 38 Me. 199; *Inhabitants v. Thatcher*, 3 Metc. 239.) The plaintiff, as a purchaser of the property, has the same right to recover for past damages and to restrain future interference with the easements as Steward had. (*Abendroth v. N. Y. E. R. R. Co.*, 122 N. Y. 1; *Lahr v. M. E. R. Co.*, 104 id. 268; *Henderson v. N. Y. C. & H. R. R. Co.*, 78 id. 429; Laws of 1850, chap. 140, § 18; Laws of 1875, chap. 606, § 20; *S. A. E. R. Co. v. Kerr*, 72 N. Y. 333; *In re Comrs.*, 56 id. 152; *Bloodgood v. Mohawk*, 18 Wend. 19; *Taylor v. Hopper*, 62 N. Y. 649; *N. E. Bank v. M. E. R. Co.*, 108 N. Y. 660; *Dean v. M. E. R. Co.*, 119 id. 546; *Tallman v. M. E. R. Co.*, 121 id. 119; Sedg. on Dam. 296; *Francis v. Schoellkopf*, 53 N. Y. 152; *Story v. N. Y. E. R. Co.*, 90 id.

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122; *Smith v. City of Rochester*, 38 Hun, 612; 104 N. Y. 674; *Corning v. T. I. & N. Co.*, 40 id. 191, 206; *Webb v. Portland*, 3 Sumn. 189; *Wilts v. Swindon*, L. R. [9 Ch. App.] 451; *Lyons v. McLaughlin*, 32 Vt. 425; *Meyer v. Phillips*, 97 N. Y. 490, 491; *Garwood v. N. Y. C. & H. R. R. Co.*, 83 id. 406; *Ware v. Allen*, 140 Mass. 515; *Lund v. New Bedford*, 121 id. 288-290; *Lunson v. Menosha*, 59 Wis. 298; *Knox v. M. E. R. Co.*, 12 N. Y. Supp. 878.) There are no valid exceptions to the admission of evidence. (*Abendroth v. N. Y. E. R. Co.*, 122 N. Y. 1; *Kane v. N. Y. E. R. Co.*, 125 id. 125; *Crawford v. M. E. R. Co.*, 120 id. 625; *McGean v. M. R. Co.*, 117 id. 222.) It was quite immaterial that Steward saw the road being constructed, even if there were any evidence that he had. (*Abendroth v. N. Y. E. R. Co.*, 122 N. Y. 1; *Matlage v. N. Y. E. R. Co.*, 67 How. Pr. 240; 16 N. Y. 97; 84 id. 182; *Ramsden v. Dyson*, L. R. [1 H. L.] 129; *McMurray v. McMurray*, 66 N. Y. 175.) No objection was raised to the recovery during the possession of any tenants. (*Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 164; *Post v. M. E. R. Co.*, 125 id. 697; *Francis v. Schoellkopf*, 53 N. Y. 152; *Taylor v. M. E. R. Co.*, 18 J. & S. 301; *Pollit v. Long*, 58 Barb. 20; *Lambert v. Hake*, 14 Johns. 383; *Bell v. Midland*, 10 C. B. [N. S.] 287; *Jesser v. Gifford*, 4 Burr, 2141; *Hare v. Jackson*, 11 Mass. 519; *Sumner v. Tileston*, 7 Pick. 198; *Timlin v. S. O. Co.*, 126 N. Y. 514; *Jennings v. Van Schaick*, 108 id. 534; *Doyle v. Lord*, 64 id. 437.) The Court of Appeals will not consider the competency of a witness after that has been determined by the trial court. (*Slocovitch v. O. Ins. Co.*, 108 N. Y. 56; *Lewis on Em. Domain*, § 437; *Jones v. Tucker*, 41 N. H. 546; *Nelson v. S. M. Ins. Co.*, 71 N. Y. 460; *Swan v. Middlesex*, 101 Mass. 177; *Tooley v. Bacon*, 70 N. Y. 37.) Even if the court should find that any errors have been committed by the trial court, it must affirm an equity judgment where there remains sufficient evidence to support it. (*In re N. Y. C. R. R. Co.*, 90 N. Y. 347; *Forrest v. Forrest*, 25 id. 501, 510; *Marsh v. Pierce*, 21 Wkly. Dig. 51; *Wright v. Moschowitz*, 10 Civ. Pro. Rep.

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107; *Machen v. L. Ins. Co.*, 2 id. 28; Code Civ. Pro. § 1003; *McLean v. M. R. Co.*, 117 N. Y. 219; *Shapcott v. Chappel*, L. R. [12 Q. B. D.] 58.) The judgment of injunction must be affirmed, even if there be any error as to the award for past damages. (*Corning v. T. I. & N. Co.*, 40 N. Y. 191, 206; *Smith v. City of Rochester*, 38 Hun, 612; *Webb v. City of Portland*, 3 Sumn. 189; *Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 165; *Tallman v. M. E. R. Co.*, 121 id. 119; *N. Y. N. E. Bank v. M. E. R. Co.*, 21 J. & S. 511; 108 N. Y. 660; *Lawrence v. M. E. R. Co.*, 12 N. Y. Supp. 546; 126 N. Y. 483; *Carter v. N. Y. E. R. Co.*, 25 J. & S. 279; *Henderson v. N. Y. C. R. R. Co.*, 17 Hun, 352; Bishop on Patents [2d ed.], 629.)

HAIGHT, J. The judgment appealed from enjoins the defendants from the further maintenance of their elevated railway in Pearl street, in the city of New York, in front of the plaintiff's premises abutting upon that street and known as numbers 95 and 97, unless the defendants pay to the plaintiff the sum of \$9,500, as the value of the easements appurtenant to the premises taken by the maintenance and operation of the road.

The trial court has found as a fact that the plaintiff "is now and has been since the 27th day of November, 1882, seized of an estate of inheritance in fee simple absolute in the premises. * * * And has since the said 27th day of November, 1882, been and now is possessed of said premises through her agents and servants." An exception was taken to this finding which presents the only question we are called upon to determine.

The facts are substantially without dispute. At the time of the construction of the elevated railroad, the premises in question were owned by one John Steward, who had leased the same to tenants who were in the actual possession thereof. On November 21, 1878, and December 21, 1878, Steward executed and delivered to Charles G. Wolff two instruments in writing under seal, purporting to convey the premises to Wolff. But the instruments were in fact given, received and

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intended by both parties thereto as collateral security for advances of money made and to be made by Wolff to Steward. On November 22, 1882, Wolff executed and delivered to Sophie E. Minton, the plaintiff, a deed of the premises in consideration of the sum of \$50,000, which she paid by assuming a mortgage of \$30,000, then outstanding upon the property, and the balance in cash. This deed was executed by Wolff at the request of Steward, and they both intended that the deed to the plaintiff should convey to her the fee. There is no pretense but that the plaintiff paid full value for the premises. If, therefore, she purchased *bona fide* without notice that Wolff's deeds were intended as a security for the loans of money, she obtained a good title. (*Whittick v. Kane*, 1 Paige, 202; *White v. Moore*, Id. 551; *Berdell v. Berdell*, 33 Hun, 535; *Meehan v. Forrester*, 52 N. Y. 277.)

There is no evidence showing that the plaintiff had actual notice, but it is contended that she had constructive notice from the fact that Steward was in possession through his tenants, and that because she failed to make inquiry of them as to the title under which they held, she should be treated as though she had actual notice.

We are aware of the general rule that possession is notice, to the person proposing to purchase, of the rights of the occupant, but question its application in this case under the facts disclosed.

As we have seen, the trial court has found that the plaintiff entered possession on the same day that she received her deed. And the inference to be drawn from the testimony is that possession was given her by the agent or broker of Steward, and with his consent. Steward testified that he collected the rents after 1878; that he collected in the years 1880, 1881 and 1882; that that was the last. He could not tell when he ceased to collect rents, for he did not remember when the premises were conveyed. The date of the deed to the plaintiff was, as we have shown, November 22, 1882. He ceased to collect the rent in that year, and it is quite apparent that he intended to be understood that he collected the rents down to the time that

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the premises were conveyed and then stopped. Again, he testified: "The conveyance made by Wolff to Minton was with my consent. I had authorized him for some time to sell the property; he was authorized to sell the property and to pay me the difference after it was sold from the balance in his hands. There were no writings about it. Mr. Wolff acted as my broker. That is the amount of it; I employed him. He was my broker in the matter of borrowing the money in connection with the transactions in which I raised the money. They were transactions of a mercantile character." Steward further stated that his debt had been paid off; that he did not know of the transaction between Wolff and Minton at the time the property was sold on that particular day, or what consideration passed between them. He could not tell the precise amount, but had a general idea of the amount, and could not tell whether his debt was paid before or after the conveyance to Minton. Wolff testified that the sale to Minton "was made after conversation with Mr. Steward upon the subject and with his authority." This testimony, with the inference to be drawn therefrom, appears to us to clearly establish the facts as above stated, and consequently to take the case out of the general rule.

We are also of the opinion that Steward is now estopped from asserting or maintaining any claim to the title or right to redeem. As we have seen, the sale to the plaintiff was made with his knowledge, consent and authority. It was made by his broker who was employed for that purpose, and authorized to sell. Steward had the benefits of the proceeds of the sale. The thirty thousand dollar mortgage was assumed by the plaintiff and Steward says his debt to Wolff was paid. Wolff says the balance of the purchase-price after paying taxes, etc., was applied by him on Steward's indebtedness. Steward has ever since acquiesced in the sale and still continues to do so. Can he now, after reaping the benefits, be permitted to complain of the transaction and establish a claim to the property? We think not. It would be in violation of well-established rules, and contrary to the principles of equity. (*Wilson v. Par-*

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shall, 27 N. Y. S. R. 178; *Gennerich v. Ulrich*, 35 id. 144; *Noxon v. Glen*, 2 id. 661; *McNeil v. Tenth National Bank*, 46 N. Y. 325; *Merchants' Bank of Canada v. Livingston*, 74 id. 223.)

The other questions involved have been recently disposed of. (*Pappenheim v. Metropolitan E. R. Co.*, 40 N. Y. S. R. 445; 128 N. Y. 436; *Lynch v. Same*, 129 id. 274.)

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

WILLIAM LOCKWOOD et al., Respondents, v. EDWARD B.
BARTLETT et al., Appellants.

Under the Quarantine Law of this state (Chap. 358, Laws of 1863, as amended by chap. 592, Laws of 1865), and the United States Statutes (§§ 4792, 4793), the health officer of the port of New York is clothed with power to use means to protect the public against *contagia* from infected vessels and cargoes arriving at that port.

Under the provisions of the Quarantine Act (Chap. 358, Laws of 1863, as amended by chap. 592, Laws of 1865), which declares that "whenever any expense shall be incurred by the health officer, or whenever any services shall be rendered by him or his employes in the discharge of the duties imposed upon him by law in relation to vessels, merchandise * * * under quarantine, such expense and services shall be paid for, by the master of the vessels" to the health officer, and shall be a lien on the vessels, merchandise, etc, such charges can only be incurred through the official action or in execution of the orders, of the health officer, and are subject to his control; to create the lien, his official sanction and responsibility are essential.

In an action to recover damages for the alleged unlawful taking and detention of certain cargoes of rags imported by plaintiffs, it appeared that the warehouse of the defendants, who composed the firm of B. & Co., had, under the advice and with the approval of the health officer of the port of New York and of the health commissioner of Brooklyn, been designated by the secretary of the treasury as a warehouse for the storage and disinfection of imported rags. Robbins' Reef had also been designated as another place for disinfection. In pursuance of this authority the collector sent one cargo of the rags for disinfection to the warehouse of B. & Co., and another to Robbins' Reef. *Held*, that what was done in transferring the rags from the vessels to the selected warehouses was within the power of the health officer, and so that the charges for light-

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erage paid, in accordance with the custom, by B. & Co. on the rags sent to their warehouse, and the usual charges for storage for the time the goods properly remained in said warehouse were a lien upon the rags. The quarantine regulations promulgated by the health officer contained a provision to the effect that a vessel with rags from healthy ports would be required to furnish satisfactory evidence that the rags were gathered in districts where no suspicion of cholera existed; in default of which the cargo would be subject to the regulation applicable to rags from an infected port. The evidence required was an affidavit of the shipper, and the certificate of the United States consul at the port of shipment "that the person making the affidavit is a man of good character and entitled to credit." The rags in question came from a healthy port. There was an affidavit of the shipper, as required, but the consular certificate did not contain the statement required as to the character of the affiant. *Held*, that the proof was defective and the rags were properly held subject to said regulation.

A company had established disinfecting works at Robbins' Reef and was employed by the health officer to perform that work. The lighterage charges on the cargo delivered there were paid by B. & Co. The rags delivered to that firm were disinfected by it, the work being done without any employment or direction of the health officer, and without approval by him of the work or the charge therefor. Said firm refused to deliver the rags in its warehouse to plaintiffs unless the bills for lighterage and disinfection were paid. They were paid by plaintiffs under protest, and the rags were thereupon delivered to them. *Held*, that the charges for disinfection were not brought within the statute, as they had not the official sanction of the health officer; and so, that B. & Co. had no lien therefor, and so far as defendants required the payment of those charges as a condition of delivery, they were chargeable with duress of property and plaintiffs were entitled to recover back the same. S., the health officer was made a party defendant, the complaint charging a conspiracy between him and the other defendants for the purpose of enabling them to create the charges and assert the lien. The jury failed to agree upon a verdict as to S., but rendered a verdict against the other defendants, which plaintiffs consented to and did accept. It was claimed that the verdict was ineffectual to sustain a judgment against the defendants other than S. *Held*, untenable; that the charge of conspiracy was not necessarily a controlling element and did not require a verdict for or against all of the defendants jointly; that plaintiffs having accepted the verdict there was no further support for the action against S., and as the action was in tort a verdict against the other defendants was proper.

(Argued October 15, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order

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made November 7, 1889, which modified, and affirmed as modified, a judgment in favor of plaintiffs entered upon a verdict.

The plaintiffs were the owners and consignees of a quantity of rags imported from Hiogo, Japan, in ship *Vigilant*, which arrived at the port of New York, May 30, 1885, and imported from Leghorn, Italy, in bark *Battaglia*, which arrived at same port June 6, 1885.

This action was brought to recover damages alleged to have been sustained by the plaintiffs by reason of the wrongful taking and detention of the rags, and to obtain the possession of which they were required to and did, under protest, pay the appellants a large sum of money claimed for the expenses of carriage, disinfection and storage for which charges were made. And they allege that this was consummated by conspiracy between the defendants Bartlett, Woodruff and Nitchie, partners constituting the firm of E. B. Bartlett & Co., and the defendant Smith. The defense was founded upon the alleged right through the authority derived from the United States treasury department, the collector and health officer of the port of New York. The defendant Smith was the health officer.

In December, 1884, E. B. Bartlett & Co. requested the United States treasury department to select their warehouse in the city of Brooklyn, and known as the Baltic Stores as a warehouse for the storage and disinfection of imported rags. The matter of the landing and storage of rags there for that purpose was referred to the health officer, who deemed it a proper place, and thereupon the treasury department approved the selection and instructed the collector of customs that where rags requiring disinfection form part of a cargo, they be placed on lighters and taken to the place so designated, and if the whole cargo of a vessel was rags, they should be unloaded at that place.

On June 3, 1885, the collector, by general order, directed the inspector on board the ship *Vigilant* to send to the Baltic Stores all merchandise for which no permit or order had been received by him to the contrary of such direction, except articles of the character there mentioned. Rags were not

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within the exception. And June ninth, under that general order, the collector directed such inspector to send on bonded lighters to Baltic Stores for disinfection all rags on the *Vigilant* for which no permit had been received. This was done accordingly. And certificates were afterwards made by the United States inspector of rags that they were disinfected.

With a view to the objection of the health authorities of Brooklyn to the storage of rags at the Baltic Stores for that purpose, permission was given to the disinfecting company to establish disinfecting works at quarantine. This was done at Robbins' Reef. On or about June 19, 1885, pursuant to the direction of the collector, the rags on the bark *Battaglia* were unloaded and by bonded lighters taken to Robbins' Reef for disinfection. The lighterage charges were paid by E. B. Bartlett & Co., and the bill for them and for disinfection and storage was made out to their credit against the plaintiffs, amounting to \$4,904.90, on account of the rags taken from the *Vigilant*, and \$409.25 on account of those taken from the *Battaglia*, and they refused to deliver the rags to the plaintiffs unless those bills were paid. They were paid by plaintiffs, under protest, about October 9, 1885, and the rags were then delivered to them. The trial court instructed the jury that the defendants, other than Smith, were liable to the plaintiffs for the amount so paid, with interest from the time of payment, and directed them to find accordingly; and submitted to them the question whether the plaintiffs were entitled to recover any and what amount of further damages arising out of the taking and detention of the property. Also submitted to the jury the question of liability of the defendant Smith. The jury were unable to agree on verdict for or against him, and they found a verdict against the other defendants for \$8,000. Judgment was entered against them accordingly, with costs. The General Term reduced the recovery of damages to the amount paid by the plaintiffs to those defendants, with interest, and as so modified affirmed the judgment.

Further facts are stated in the opinion.

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Wm. W. Goodrich for appellants. E. B. Bartlett & Co. had the right to detain the goods under the order of the collector of customs and under the United States statutes. (U. S. R. S. §§ 2774, 2807, 2826, 2963, 2965, 2969, 4792, 4793.) E. B. Bartlett & Co. did not have control of the delivery of the rags. The goods were in the possession and under the control of the collector of the port and of the United States. (*U. S. v. MacDonald*, 2 Cliff. 271; *Clark v. Peaslee*, 1 id. 545.) E. B. Bartlett & Co. had the right to detain the goods under the authority conferred upon the health officer of the port of New York, by the laws of the state of New York. (Laws of 1863, chap. 358, § 28.) The judgment entered upon the verdict should be set aside on the ground that there was no verdict. (Code Civ. Pro. § 1186; *Soria v. Davidson*, 9 Civ. Pro. Rep. 23; *Wolf v. G. Ins. Co.*, 43 Barb. 400; *Van Schaick v. Trotter*, 8 Cow. 599; *Porter v. Mount*, 45 Barb. 422.)

Charles W. Bangs for respondents. The verdict upon which the judgment was entered was proper and sufficient in form, and valid in effect. (Code Civ. Pro. §§ 1106, 1204; *Murray v. N. Y. L. Ins. Co.*, 96 N. Y. 614; *Train v. Taylor*, 51 Hun, 215; *Warner v. N. Y. C. & H. R. R. Co.*, 52 N. Y. 437; *Mack v. H. R. R. Co.*, 56 How. Pr. 108; *Briggs v. Milton*, 99 N. Y. 531.) The action being one in tort, for wrongful injury to plaintiffs' property, a separate judgment against Bartlett & Co. could be rendered and entered. (Code Civ. Pro. § 1204; *McIntosh v. Ensign*, 28 N. Y. 169; *Brumskill v. James*, 11 id. 294; *Dominick v. Eacker*, 3 Barb. 17; *Montfort v. Hughes*, 3 E. D. Smith, 591; *L. O. Co. v. S., etc., Co.*, 42 Hun, 153; *Fay v. Lynch*, 17 Wkly. Dig. 348; Cooley on Torts, 126; *Hutchins v. Hutchins*, 7 Hill, 104; *Verplank v. Van Buren*, 76 N. Y. 259; *Wood v. Amory*, 105 id. 278; *Jones v. Baker*, 7 Cow. 445; *Place v. Minster*, 65 N. Y. 89.) The direction by the court of a verdict against E. B. Bartlett & Co. was proper. (U. S. R. S. § 2505; *Badger v. Gutierrez*, 111 U. S. 734; *Tracy v. Swartwort*, 10 Pet. 80; *Conrad v. Ins. Co.*, 6

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id. 262; *Underhood v. Green*, 42 N. Y. 140.) The claim that Woodruff and Nitchie, Bartlett's partners in the firm of E. B. Bartlett & Co., were not liable, and that the complaint should have been dismissed as to them, is untenable. (*F. S. Inst. v. Bank*, 80 N. Y. 170.) The objections to the admission of testimony of transactions with Dr. Smith when Mr. Bartlett was not present, and of transactions with Mr. Bartlett when Dr. Smith was not present, are untenable. (*Place v. Minster*, 65 N. Y. 89-105; *Verplank v. Van Buren*, 76 id. 260; *Apthorp v. Comstock*, 2 Paige, 482.) The amount of the verdict and judgment, at least as modified by the General Term, is proper. (*Harmony v. Bingham*, 12 N. Y. 112; *Briggs v. Boyd*, 56 id. 293.) Upon this appeal, this court will not determine or review any question of fact arising upon conflicting evidence in the court below. (Code Civ. Pro. §§ 1337, 1338; *Green v. Fortier*, 80 N. Y. 640; *Bigelow v. Legg*, 102 id. 652; *Platt v. Platt*, 58 id. 646; *In re Bull*, 111 id. 624; *Goodwin v. Conklin*, 85 id. 21; *In re Ross*, 87 id. 514; *People v. French*, 92 id. 306; *Davis v. Leopold*, 37 id. 620; *Hackford v. R. R. Co.*, 53 id. 654; *N. Bank v. Westcott*, 118 id. 473; *Dillon v. Cockcroft*, 90 id. 649; *Innes v. Dauchy*, 82 id. 473; *Colligan v. Scott*, 58 id. 670; *Provost v. McEncroe*, 102 id. 650.)

BRADLEY, J. The question of the liability of the defendants other than Smith, as presented at the trial, was by the parties treated as one of law only, so far as related to the claim for the money paid by the plaintiffs to obtain the possession of the goods, and to which amount the modification of the judgment by the General Term reduced the recovery. And if there was any evidence to support it to that extent, the direction of a verdict for that sum was without error, unless the exceptions having relation to the nature of the action, or the efficiency of the verdict, were well taken. (*Winchell v. Hicks*, 18 N. Y. 558; *Dillon v. Cockcroft*, 90 id. 649.)

The plaintiffs were the owners of the rags, and they were unconditionally entitled to possession of them, and without payment of the charges asserted against them, unless by force

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of some rule of law, regulation or authority the goods were lawfully taken and detained for the alleged purposes and subjected to the lien of charges for carriage, disinfection and storage, or for some portion of them. The defendants contend that the rags were taken and treated pursuant to legal authority, and that the amount of the charges so claimed was a lien upon the property, by which was justified the refusal of Bartlett & Co., until payment was made, to deliver it to plaintiffs.

Sanitary regulations are properly and necessarily provided for and applied at ports of entry for vessels and cargoes from foreign countries. And the health officer of the port of New York is clothed with power to use means to protect the public against *contagia* from infected vessels and cargoes arriving there from elsewhere, pursuant to the statute "establishing a quarantine, and defining the qualifications, duties and powers of the health officer for the harbor of New York." (L. 1863, ch. 358; L. 1865, ch. 592.) And it is provided by the statutes of the United States that the quarantine and other restraints established by the health laws of any state respecting any vessels arriving in any port thereof shall be observed by the officers of customs, etc., and all such officers of the United States shall faithfully aid in the execution of such quarantine and health laws, and as they shall be directed from time to time by the secretary of the treasury. (U. S. R. S. § 4792.) And whenever, by the health laws of any state or by the regulations made pursuant thereto, any vessel arriving within the collection district of such state is prohibited from coming to the port of entry or delivery, and such health laws require or permit the cargo of the vessel to be unladen at some other place within or near the district, the collector, after due report to him, may grant his warrant or permit for the unlading or the charge thereof under the care of the surveyor or of an inspector at some other place where such health laws permit, and upon the conditions and restrictions which shall be directed by the secretary of the treasury. (Id. § 4793.) The rags were free from duty, and the only ground upon which the detention of them from the plaintiffs could lawfully be justi-

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fied, is that it was with a view to the protection of the public health. This was apparently the object, and whether the action was duly had for that purpose remains to be considered.

By reference to orders and circulars from the treasury department to the collector and through the latter, as well as by regulations of the health officer, it appears that provision was made with a view to such protection.

In the quarantine regulations promulgated by the health officer in August, 1884, was the provision that vessels with cargo wholly or in part rags from an infected port or district would not be given pratique, "vessels with rags from healthy ports would be required to furnish satisfactory evidence that they had been gathered in districts where no suspicion of cholera existed, in default of which the cargo would be subject to the regulation which related to such a cargo from an infected port." And that the evidence "must consist of an affidavit made by the original shipper before the U. S. consul at the port of shipment that the rags have not been gathered in cholera-infected districts and the certificate of such consul *that the person making the affidavit is a man of good character and entitled to credit.*" In the consular certificate annexed to the affidavit of the shipper of rags on the *Vigilant* the requirement relating to the character and credit of the affiant was not observed.

By circular issued by the secretary of the treasury in November, 1884, the unloading of rags from infected ports, amongst which were classed France, Italy and all Mediterranean and French ports, was prohibited, and it was directed that no old rags should be landed at any port of the United States, except on a certificate of the U. S. consular officer at the port of departure that they were not gathered or baled at or shipped from any infected place or any region contiguous thereto, and that the order would not be construed to allow the unloading of any old rags, except upon the usual permit of the local quarantine or health officers. This circular directed to officers of customs and others, was in harmony with the regulations of the health officer and in aid of their enforcement.

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In December following, another circular of the secretary of the treasury in like manner issued to the collector of customs, directed that no old rags except those afloat before January 1, 1885, on vessels bound directly to the United States, should be landed there from any vessel, except upon disinfection at the expense of the importers. And on January 12, 1885, in a circular of the secretary of the treasury to the collector of the port of New York, and in which was approved the selection of the Baltic Stores as a place for storage and disinfection of rags, it was provided that where an entry should be presented for rags which had not been disinfected, it should be accepted, but the permit to land should be coupled with the condition that the rags be taken to the proper storehouse for disinfection, and only be delivered therefrom upon a further permit issued by the collector upon the certificate of the inspector in charge of the store that the requirements of the circular had been complied with. Following this and on January fourteenth, the collector by his order directed that on entry of old rags shipped on and after the first of that month, and which had not been disinfected prior to importation, the permit would have written on the face of it directions to the inspector to send the rags to the Baltic Stores by bonded lighters for disinfection. This is in the main the situation as represented by the regulations, orders and circulars on the 30th of May, 1885, when the ship *Vigilant*, with the rags from Hiogo, Japan, arrived. And a permit or pass was issued by the deputy health officer giving the vessel permission to proceed, but preceding the words of permission, and opposite "Cargo General" were the words "rags excepted." This, as explained by the evidence of the health officer, meant that the vessel be allowed to proceed to the dock and discharge its cargo other than rags. And this is a reasonable interpretation of the permit in that respect. The witness said this was the usual custom at the port in respect to certain articles to expedite delivery to merchants. After the general order of the collector to send to the Baltic Stores all the merchandise, with specific exceptions, on the *Vigilant* for which no permit had

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been received by the inspector on board to the contrary of such direction, had been issued, and on June fifth the collector was instructed by circular from the secretary of the treasury, that as to rags "per Vigilant," which importers claimed were mostly on board before January first, to submit the matter to the health officer and to be governed by him in respect to it. After his attention was called by the collector to this instruction, the health officer concluded a lengthy communication of date June 6, 1885, to the collector as follows: "It seems, therefore, advisable that for the present the rule of disinfection should be general, and that for reasons which have been set forth the rags on the Vigilant should not be an exception to the rule." The collector thereupon and on June ninth directed the inspector in charge of the ship Vigilant (under general order of the June third) to send on bonded lighters to the Baltic Stores all rags for which no permit had been received. This was done and it and what followed in respect to the rags on the Vigilant resulted in the consequences of which the plaintiffs complain.

On June tenth, the health officer made a certificate to the effect that the rags, "per ship Vigilant from Hiogo (Japan), *to be disinfected*, are not from a cholera-infected port." But by it he treats the rags subject to disinfection, in accordance with his letter of the sixth of June to the collector. The secretary of the treasury relieved his department from further responsibility on the subject of disinfection of rags by his circular of June tenth, by which it was ordered that all circulars of the department concerning the disinfection of imported old rags were revoked; and that all of them thereafter imported from foreign countries should be admitted to entry at the custom-house upon the production of permits from the health officers at the port of importation, duly authorizing the landing of them; and that vessels carrying old rags would be detained by the quarantine officers and held subject to the order of the proper health authorities at the port of destination. And two days later, by another circular of the secretary of the treasury, the collector was directed to notify the proprietors of warehouses

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where disinfection had theretofore been effected under his (collector's) supervision, that the disinfection of old rags was under the exclusive jurisdiction of the health officer, and must be done at such places as he might designate; and that the designation of their warehouse for such purpose was revoked. By another circular of the secretary of the treasury to the collector, of June eleventh, referring to the desire of the consignees of the rags per Vigilant to be governed by the circular of the tenth, he advised that the department had no objection to this with the understanding that all the facts be first submitted to the health officer. It seems that pursuant to the pre-existing regulations on the subject, the disinfection at the Baltic Stores of the rags taken from the Vigilant was certified by the United States inspector of rags in charge of the warehouse.

The rags imported in the Battaglia were, on or about the nineteenth of June, taken by lighters to Robbins Reef, a place in quarantine designated by the health officer for disinfection. The specific reference made to the regulations, orders and directions of the health officer and treasury department and the execution of them directed by the collector sufficiently show the manner the authority was given, assumed and exercised in taking the possession of the rags for the purposes there indicated. And whatever the secretary of the treasury, and through him the collector, was lawfully permitted to do in that respect, was in aid of the health officer and in observance of the health laws of the state. The direction of the collector that the rags be sent to the places where they were taken from the vessels, was pursuant to the regulation or requirement that they should be disinfected, and it may be said to have been given pursuant to direction from the secretary of the treasury and in aid of the health officer in the execution of his official power by the observance of the regulations made by him in that behalf. And although these rags came within the rule or regulation adopted by him for disinfection, and by his approval and advice were sent to the place where they were taken for that purpose, he testified that

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he never gave any order for the disinfection of the rags on either of the two vessels. While his regulations provided that it be done, and for that purpose the transfer of the rags from the vessels to the warehouses was necessary, it does not appear that he employed anybody to do it. And so far as appears the work of disinfection was not conducted under the supervision or control of the health officer, nor pursuant to his employment of the disinfecting company which owned the machine by which it was done, or of E. B. Bartlett & Co., who under an arrangement with the company operated the machine in performance of the work. The goods were sent to the warehouse apparently for the purpose of disinfection, and they assumed to do it without any employment or direction of the health officer, and did it without any approval by him of the efficiency of the work or of the charges resulting from it. This method of creating charges against imported goods is not fairly within the purpose and meaning of the statute, which provides: "Whenever any expense shall be incurred by the health officer, or whenever any services shall be rendered by him or his employes in the discharge of the duties imposed upon him by law in relation to vessels, merchandise, baggage, dunnage," etc., "under quarantine such expenses and services shall be paid for to the health officer by the master of the vessels," etc. (L. 1865, ch. 592, § 6); and such expenses, services and charges shall be a lien on the vessels, merchandise and other property in relation to which they shall have been made or such services of the health officer shall have been rendered. (Id. § 7.) The difficulty with the claim for disinfection is that the company or persons doing it had no direction of the health officer for that purpose, nor was it done by his employes. The statute contemplates that charges of this character shall be incurred only by means of the official action or in executing the orders of the health officer and be subject to his control through those whom he may employ to perform the services. His official sanction and responsibility were essential to the creation *in invitum* of charges upon the property of the plaintiffs. Those for the alleged service of

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disinfection seem not to have had such support; and, therefore, were not a lien upon the rags. But this difficulty is not necessarily applicable to the charges for lighterage and storage. The Baltic Stores had, under the advice and approval of the health officer of the port of New York and the health commissioner of Brooklyn, been selected and designated by the secretary of the treasury as a warehouse for the storage and disinfection of imported rags. And Robbins Reef had also been duly designated as another place for disinfection of like goods. The collector, under his authority, in view of the regulation for disinfection of the rags on the two vessels adopted by the health officer, was justified in directing as he did the sending of the rags to those places, and the expenses of such transfer were presumptively a lien upon the property to which they related. No specific order or direction of the health officer is essential for that purpose. It is sufficient that it was done pursuant to regulations, within his power, made by him. Of course, if the transfer of the rags to those places for any purpose was caused by collusion or conspiracy between the health officer and Bartlett & Co., no lien in behalf of the latter could result for the charges and storage. But while that was charged in the complaint, it was not supported by the verdict taken against the appellants alone, and is entitled to no consideration in the case as now presented. The question is solely one of power and authority upon the assumption that the health officer acted in good faith, which has the support of presumption since the jury failed to find a verdict against the defendants upon that issue. In view of what has already been observed, that which was done by way of transfer of the rags from the vessels to the selected and designated warehouses for the purposes contemplated, was within the power of the health officer and in aid of the exercise of which the direction of the collector to make the transfer may have been legitimately given and executed, and as the case is now presented it must be so treated. It follows that the charges for lighterage paid by Bartlett & Co., according to the custom in such cases, and for the storage in their Baltic Stores for the time the goods

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properly remained there, were a lien upon the rags. But so far as the defendants required the payment of the further claim for disinfection as a condition of the delivery, they were chargeable with duress of property. The right to recover those two items of the bill and each of them is challenged by exceptions taken. It is unnecessary to consider the question whether or not the defendants were entitled to the full amount charged for storage, as there is no basis furnished by the evidence to sever it.

It is urged that there was no verdict effectual to support the judgment, because it was found only against the defendants other than Smith and none as to him was rendered by the jury.

The action was in tort. The charge of conspiracy in the complaint was not necessarily the controlling element of its nature, and it did not require a verdict for or against all of the defendants jointly upon the cause of action there alleged. The defendant Smith was not chargeable with the act of refusal to deliver the property to the plaintiffs, nor did he receive any of the money paid by them to obtain the possession of the rags. His alleged liability was founded upon the charge of conspiracy and collusion with the other defendants for the purpose of enabling them to create the charges and assert the lien to the prejudices of the plaintiffs. And as the plaintiffs consented to and did accept the verdict against those defendants, it is difficult to see any further support for the action against the defendant Smith while the recovery on the verdict remains effectual. In *Porter v. Mount* (45 Barb. 422), the cause of action, as alleged in the complaint, was upon a joint contract of the defendants, which denies to that case any necessary application to the present case. The money was paid by the plaintiffs to the defendants upon bills in favor of E. B. Bartlett & Co., who refused to deliver the possession of the rags to the plaintiffs until payment was made. All the members of that firm were for the purposes of the relief equally chargeable to the plaintiffs. These views lead to the conclusion that the judgment should be reversed and a new trial granted, costs to abide the event, unless the plaintiffs

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stipulate to reduce the recovery of damages to three thousand one hundred and eighty-two dollars and fifty cents, and in that event the judgment be so modified and, as modified, affirmed, without costs in this court to either party.

All concur, except POTTER and VANN, JJ., not voting.

Judgment accordingly.

JEFFERSON D. BERNSTEIN, Respondent, v. HENRY L. MEECH et al., Appellants.

Defendants entered into a contract in writing with plaintiff to furnish him a hall in the city of B. for four performances of a theatrical company, plaintiff to receive fifty per cent of the gross receipts. Plaintiff thereafter wrote to defendants inclosing a contract for them to sign, by the terms of which he was to receive sixty per cent of the gross receipts, and stated in his letter that he could not think of playing for less. Defendants returned said contract unsigned, with a letter stating that they already had a contract signed by plaintiff, and did not need any other. Defendants subsequently, having received from plaintiff's agent for publication certain advertisements, wrote said agent expressing surprise, and stating they had supposed from plaintiff's letter that the company was not coming to B., and that they could not arrange for the performances on the dates named. This letter was not received by said agent until his arrival at B. to make arrangements for said performances, to which place the letter had been forwarded. Plaintiff with his company came to B. in due time to perform his contract, but was refused the use of the hall. In an action upon the contract, the court refused to direct a verdict for defendants, but submitted to the jury the question as to whether defendants were relieved from the obligation of their contract. *Held*, no error; that defendants' letter, in response to that of plaintiff inclosing the proposed new contract, was an election on their part to keep the executed contract in force, which operated upon the rights of both parties, and so the contract was kept alive until the time of performance.

Also *held*, that while the amount of profits plaintiff would have realized had the contract been performed, were not susceptible of proof, and so not recoverable, plaintiff was entitled to recover the amount of expenses legitimately and necessarily incurred by him for the purposes of the performance of the contract on his part; that it could not be assumed plaintiff would have lost any part of these expenditures had he been permitted to perform.

Windmuller v. Pope (107 N. Y. 674), distinguished.

(Argued December 1, 1891; decided December 22, 1891.)

180	354
189	486

130	354
142	188

180	354
144	659

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APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This was an action to recover damages for a breach of contract.

The facts are sufficiently stated in the opinion.

Leroy Andrus and *John T. Joyce* for appellants. The plaintiff's letter of August twelfth was a positive refusal on his part to perform the contract, and in view of that refusal the defendants not only had the right, but it was their duty to take such steps as were necessary to find other employment for their Academy of Music on the dates named and thus avoid loss. (*Hough v. Brown*, 19 N. Y. 111; *Rinz v. Renauld*, 100 id. 256; *Windmuller v. Pope*, 107 id. 674; *Hochster v. De La Tour*, 2 El. & Bl. 678; *Daniels v. Newton*, 114 Mass. 530; *Nason v. Holt*, 114 id. 541.) Plaintiff was not entitled to recover as damages the expenses incurred by him in paying salaries of his company, or for printing, hotel bills, or any of the items proved by him. (*Schonberg v. Cheney*, 3 Hun, 677; *Wakeman v. W. & W. M. Co.*, 101 N. Y. 205; *Taylor v. Bradley*, 4 Abb. Ct. App. Dec. 363; *Dart v. Laimbier*, 107 N. Y. 664; *McDowell v. Oyer*, 21 Penn. St. 417; Sedg. on Dam. 27, 30, 225; *Alder v. Kingsley*, 15 M. & W. 117.) The court erred in charging the jury that plaintiff was entitled to recover a reasonable hotel bill, although not the one actually incurred by him.

Herbert P. Bissell for respondent. The existence of the contract and its breach by the defendants were clearly established by the evidence. (*Butler v. Murray*, 30 N. Y. 88; *Nichols v. S. A. R. R. Co.*, 38 id. 131; *Heyne v. Blair*, 62 id. 19.) The rule adopted on the trial was the proper rule of damages to be applied to this case, under all the circumstances. (1 Suth. on Dam. 110; *Griffin v. Culver*, 16 N. Y. 489; *Allen v. McConihe*, 124 id. 347; *Driggs v. Dwight*, 17 Wend. 71;

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Vanderslice v. Newton, 4 N. Y. 133; *Wakeman v. W. & W. M. Co.*, 101 id. 209; *White v. Miller*, 71 id. 133; *Satchwell v. Williams*, 40 Conn. 371; *Freeman v. Clute*, 3 Barb. 427; *McKinnon v. McEwan*, 42 Am. Rep. 450, and note 461; *H. & T. R. Co. v. Hill*, 51 id. 642; *Brigham v. Carlisle*, 56 id. 28; *Blanchard v. Ely*, 21 Wend. 342; *Savery v. Ingersoll*, 46 Hun, 176; *Walsh v. W. Ins. Co.*, 32 N. Y. 440; *Jones v. Osgood*, 6 id. 223; *Langly v. Wadsworth*, 99 id. 61; *Schile v. Brokhaus*, 80 id. 614.)

BRADLEY, J. By contract of date August 4, 1887, between the parties, the defendants agreed to furnish to the plaintiff the opera house known as the Academy of Music, in the city of Buffalo, December twenty-second, twenty-third and twenty-fourth, for four performances by the Jarbeau Comedy Company, and for that purpose the plaintiff agreed to furnish the services of that company during that time, and to take as the consideration fifty per cent of the gross receipts of all sums realized from the performances. When this contract was executed, each of the parties had the right to assume that the other would observe its stipulations. The performances did not take place, and the reason why they did not, the plaintiff charges, was attributable to the breach of the contract by the defendants. The purpose of this action was to recover damages as the consequence. The controversy involved the construction of correspondence had between the parties subsequently to the making of the contract. The first of it was a letter from the plaintiff to the defendants of August 12, 1887, in which he inclosed a written paper for them to sign as a contract to the effect that he should have sixty per cent of the gross receipts of the performances, and he stated in the letter that he could not think of playing for less. When the defendants received this letter, it may be they were permitted to understand that the plaintiff did not intend to have his company play for the stipulated portion of the receipts first mentioned, and to treat the contract as rescinded or as still in force for such purpose only as to them might be deemed available. The view

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which was taken by the defendants of the situation was represented by their letter of date August thirteenth to the plaintiff, in which they returned the contract unsigned, and said they did so "for the reason that we have a contract signed by you and do not need any other for the appearance of Vernona Jarbeau and company at our Academy of Music, December 22, 23, and 24, 1887." By this letter, it seems that the defendants did not intend to and did not relinquish any rights which they had under the contract of the fourth of August. That agreement then remained in force, and if the plaintiff failed to perform it he would be liable to the defendants for the legitimate consequences of his default. No further communication was had between the parties until November seventeenth, when the plaintiff's agent in his letter from Chicago to the defendants inclosed advertising clippings to them for publication, and added: "Please keep Miss Jarbeau before the public as much as possible. I want to see her turn them away in your town, and she will if conditions are equal. If you had rather, I will address the newspapers myself." In that case he requested that the names of newspaper men to address be furnished him. The defendant, who was absent when the letter reached Buffalo, addressed to the agent at Chicago, November twentieth-eighth, a letter expressing his surprise, with the remark that he had supposed from the plaintiff's letter of the twelfth of August, that his company was not coming to Buffalo, and added: "We cannot now arrange to play Vernona Jarbeau" the dates before mentioned. This letter was forwarded to Buffalo and did not reach the agent until December seventeenth or eighteenth, when he came there to complete the advertising and make the arrangements preparatory to the performance. And in due time the plaintiff with his company reached Buffalo to perform his contract with the defendants. In the meantime they had arranged with James Brown Potter Company to play at the Academy of Music on those days. And the plaintiff was refused permission for his company to do so. Upon this state of facts, the question was presented whether or not the defendants were relieved from the obliga-

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tion of their contract with the plaintiff. This, in view of the circumstances, was treated by the trial court as a question of fact for the jury and exception was taken to refusal to direct a verdict for the defendants.

It is urged that the plaintiff's letter to the defendants must be treated as a refusal to perform and as a breach of the contract on his part, which relieved them from its obligation, and afforded to the defendants a right of action. It is true that when one of the parties to an executory contract has renounced it, the other party to it may act upon the assumption of such a breach before the time for performance arrives. (*Windmuller v. Pope*, 107 N. Y. 674.)

But in the present case that proposition is not necessarily applicable, because the conclusion was not required as matter of law that there was a renunciation of the contract by the plaintiff, nor was it so treated by the defendants. (Blackburn on Sales, § 744.) And whether in view of the understanding of the parties derivable from their correspondence the defendants could have acted upon the assumption of a breach by the plaintiff, and was justified in so doing, was a question presented for consideration at the trial, and which the defendants requested the court to submit to the jury. The refusal of the court to charge further than it had already charged on the subject was not error, because by the charge before then made to the jury the question in that respect had with ample instructions been fully submitted to them.

But whatever view may have been taken of the right of the defendants to treat the contract for the purposes of its performance as at an end and to act upon that assumption when they received the plaintiff's letter, they disposed of that question by their letter to him. By this it appeared that the defendants elected to keep the contract in force for the purposes for which it was made. This operated alike upon the rights of both parties, and the plaintiff was justified in so understanding it. In that view the contract was kept alive until the time arrived for performance, and the obligations of the defendants no less than those of the plaintiff for that pur-

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pose remained effectual. (*Johnstone v. Milling*, L. R. [16 Q. B. D.] 460; *Frost v. Knight*, L. R. [7 Exch.] 111; *Zuck v. McClure*, 98 Penn. St. 541.)

There was no error in the refusal of the court to direct a verdict for the defendants.

The remaining questions have relation to the damages which were the subject of the plaintiff's recovery. The general rule on the subject would permit him, in case of breach by the defendants, to recover the value of his contract. And that was dependent upon the receipts to be realized from the contemplated performances by the plaintiff's company. The results which would in that respect have been produced if the company had been permitted to perform the contract were speculative, and by no probative means ascertainable. It is contended on the part of the defendants that recovery could be founded on no other basis, and therefore the plaintiff could recover nominal damages only. The value of the contract to the plaintiff was in the profits, and in the amount of them which may have been realized over his expenses attending its performance. Those profits not being susceptible of proof, were not the subject of recovery. But by the breach of the contract by the defendants, the plaintiff was denied the opportunity which the observance of it could have given him to realize fifty per centum of such receipts as would have been produced by it. His loss also consisted of the expenses by him incurred to prepare and provide for such performance. While the plaintiff was unable to prove the value in profits of his contract, he was properly permitted to recover the amount, of such loss, as it appeared he had suffered by the defendants' breach. (*Griffin v. Colver*, 16 N. Y. 489.) The evidence warranted the conclusion that the plaintiff, through his agent, made preparations for the performance of the contract, and that the plaintiff with his troupe appeared at Buffalo, prepared and in readiness to do so. The amount of his expenses incurred for the purpose of such performance was proved, and they were the basis of the recovery. It is unnecessary to refer specifically to the items of those expenses. The jury

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were, upon the evidence, permitted to find that, to the amount of the recovery, they were legitimately incurred for the purposes of the performance of the contract, and that with a view to such purpose the plaintiff suffered a loss to that extent. Those expenses may be deemed to have been fairly within contemplation when the contract was made. It cannot be assumed that any part of this loss would have been sustained by the plaintiff if he had been permitted to perform his contract. And assuming, as we must here, that the exclusion of the plaintiff's company from the use of the opera house at the time in question was caused by the defendants' breach of the contract, the plaintiff's loss, equal to the amount of his expenses legitimately and essentially incurred for the purpose of its performance, was the consequence of their default and properly recoverable by him. (*Driggs v. Dwight*, 17 Wend. 71; *Giles v. O'Toole*, 4 Barb. 261; *Taylor v. Bradley*, 39 N. Y. 129, 142.) These views lead to the conclusion that none of the exceptions were well taken, and that the judgment should be affirmed.

All concur, except POTTER, J., not voting.

Judgment affirmed.

PELL THOMPSON et al., Respondents, v. THE MANHATTAN
RAILWAY COMPANY et al., Appellants.

An elevated railroad erected in a city street, the right to construct and operate which has not been obtained by purchase from the abutting owners, or by proceedings to condemn, is, as to them, an illegal structure, and a continuing trespass upon their rights, from the time it was built. Such a trespass is an injury to the inheritance, and a person seized of an estate in remainder in premises abutting upon the street, may maintain an action for an injunction against the railroad company, "founded upon an injury done to the inheritance, notwithstanding an intervening estate for life." (Code Civ. Pro. §§ 1665, 1681.)

(Argued December 4, 1891; decided December 22, 1891.)

Statement of case.

APPEAL from judgment of the General Term of the Court of Common Pleas of the city and county of New York, entered upon an order made February 11, 1890, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Brainard Tolles for appellants. The plaintiffs had no right to an injunction until their estate vested in possession. (*Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Pond v. M. E. R. Co.*, 112 id. 186; *Ottenot v. N. Y., L. E. & W. R. Co.*, 119 id. 603; *Tallman v. M. E. R. Co.*, 121 id. 103; *N. Y. E. R. Co. v. F. N. Bank*, 135 U. S. 441.)

John A. Weekes, Jr., for respondents. A reversioner is entitled to an injunction against a stranger who is injuring his inheritance where an injunction would be the proper remedy for an owner in possession. (*Livingston v. Hayward*, 11 Johns. 429; *Livingston v. Mott*, 2 Wend. 605; *Van Duesen v. Young*, 29 N. Y. 9, 29; *Robinson v. Wheeler*, 25 id. 252, 259; Code Civ. Pro. §§ 1660, 1662, 1665; *Hudson v. Caryl*, 44 N. Y. 553; *McKeon v. See*, 51 id. 300; *Chapman v. City of Rochester*, 110 id. 273; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 98; *Pond v. M. E. R. R. Co.*, 112 id. 186; *Story Case*, 90 id. 122; *Lahr Case*, 104 id. 270; *N. Y. N. E. Bank v. M. E. R. R. Co.*, 108 id. 660; *Henderson Case*, 78 id. 423; *Lawrence v. Bayard*, 7 Paige, 70; *Kodgill v. Moore*, 9 C. B. 364; *Jesser v. Gifford*, 4 Burr. 2141; *Tinsman v. R. R. Co.*, 25 L. J. L. 255, 262-265; *Shadwell v. Hutchinson*, 3 C. & P. 615; 4 id. 333; Code Civ. Pro. § 1618; *Francis v. Schollkopf*, 53 N. Y. 152; 3 R. S. [7th ed.] 2214, § 27; 90 N. Y. 147; 125 id. 164; *Mortimer v. M. R. Co.*, 29 N. Y. S. R. 262; *Conkling v. M. R. Co.*, 36 id. 124; *Cornell v. E. R. R. Co.*, 37 id. 624; *Macy v. E. R. R. Co.*, 36 id. 245; *Doyle v. E. R. R. Co.*, 35 id. 373; *Williams v. B. C. R. R. Co.*, 36 id. 504, 505.) As the fee damage is computed only as a grace or privilege to the defendants on the payment of which they may escape from the injunction, defendants are not entitled to complain of the terms on which such relief is

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awarded to them. (*Story Case*, 90 N. Y. 123, 179; *Lahr Case*, 104 id. 269; *Abendroth Case*, 122 id. 1; *Kane Case*, 125 id. 164; *Drucker Case*, 106 id. 162; *Kane Case*, 34 N. Y. S. R. 876; *Hamilton Case*, 30 id. 19, 20; *Taylor Case*, 53 Hun, 309; *Milhau v. Sharp*, 27 N. Y. 625, 628; *Uline Case*, 101 id. 98; *People v. Law*, 34 Barb. 495, 506, 507; *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 430; *Williams v. N. Y. Co.*, 16 id. 111; *Meyer v. Phillips*, 97 id. 485, 490, 491; *Garwood v. N. Y. C., etc., Co.*, 83 id. 404, 406; *Corning v. T., etc. Co.*, 39 Barb. 312, 326; 40 N. Y. 191; *Ware v. Allen*, 140 Mass. 513, 515; *Lund v. New Bedford*, 121 id. 268, 288, 290; *Lawson v. Menasha*, 59 Wis. 393, 398; *Smith v. Rathburn*, 75 N. Y. 122, 126, 127; *Carll v. Oakley*, 97 id. 633, 634; *Bartlett v. Stinton*, L. R. [C. P.] 493, 484; *Claflin v. Frankel*, 29 Hun, 288; *Genet v. Davenport*, 59 N. Y. 648; *Bennett v. Van Syckel*, 18 id. 481; *Murphy v. Spaulding*, 46 id. 559; *Dambmann v. Schulting*, 6 Hun, 29; *Lawrence v. Metropolitan*, 35 N. Y. S. R. 39; 126 N. Y. 483; *In re Bradner*, 87 id. 171, 177; *Smith v. Dodd*, 4 E. D. Smith, 643; *Vibbard v. Roderick*, 51 Barb. 616.)

HAIGHT, J. This action was brought for an injunction perpetually restraining the defendants from constructing, maintaining or operating an elevated railroad through Pearl street in the city of New York adjoining or in front of the plaintiff's premises, and for the damages alleged to have been sustained by reason of such construction and operation.

In the year 1870 the mother of the plaintiffs died intestate seized of the premises in question. She left her surviving the plaintiffs, and William W. Thompson, her husband, who as tenant by curtesy ever since has been in possession thereof, receiving the rents, issues and profits. Upon the death of their mother the plaintiffs became vested with an estate in remainder, and as such bring this action for an injunction, upon the theory that the maintenance and operation of the railroad is a damage to their inheritance.

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The defendants had never obtained from the plaintiffs, either by purchase or proceedings to condemn, the right to construct and operate their railroad. The structure must, therefore, as to them be regarded as illegal and a continuing trespass upon their rights from the time the road was built. (*Story v. N. Y. E. R. R. Co.*, 90 N. Y. 122; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 98.)

In the case of *Pappenheim v. Metropolitan El. R. Co.* (128 N. Y. 436), PECKHAM, J., in delivering the opinion of the court says: "As the structure is illegal, and as it constitutes, while it exists, a continuing trespass, the railroad company is under a legal obligation to remove it, and the law will presume that the company will do so. In an action at law the owner of the property interfered with or trespassed upon cannot recover damages to his premises based upon the assumption that such trespass is to be permanent. He can recover only the damages which he has sustained up to the commencement of the action. The judgment entered for the damages sustained does not operate as a purchase of the right to continue the trespass. But the owner may resort to equity for the purpose of enjoining the continuance of the trespass and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that, upon payment of that sum, the plaintiff shall give a deed, or convey the right to the defendants, and it will refuse an injunction when the defendant is willing to pay upon the receipt of the conveyance."

This action was brought in equity and for an injunction, and the question as to the permanency of the elevated road in this case is disposed of by the parties. The defendants, in their answer, allege: "That the said railway was constructed according to law and with the greatest care and skill, and that the said structure, maintenance and operation are permanent." The plaintiffs, as part of their affirmative case, read this allegation of the defendants in evidence, and the trial court found as a fact that "the defendants proclaim their intention of con-

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tinuing to maintain the said structure and to operate the said railroad substantially as they have been maintained and operated in the past, *and that said structure and its operation is permanent.*"

The question is, therefore, presented as to whether the plaintiffs as remainder-men can maintain an action to restrain the defendants from the maintenance and operation of their road permanently through Pearl street in front of the plaintiffs' premises.

Section 1665 of the Code of Civil Procedure provides that: "A person, seized of an estate in remainder or reversion, may maintain an action founded upon an injury done to the inheritance, notwithstanding an intervening estate for life or for years."

The statute provided that "A person, seized of an estate in remainder or reversion, may maintain an action of waste or trespass for an injury done to the inheritance, notwithstanding an intervening estate for life or years." (1 R. S. 759, § 8.)

Under the Code, the words "of waste or trespass for" are omitted, and the words "founded upon" are substituted in their place. The words omitted, as used in the statute, indicated the nature of the action that might be maintained. The leaving of them out of the Code would seem to indicate an intention not to restrict the party injured to such actions, but to give him the right to maintain an action founded upon an injury done to his inheritance. That an action for an injunction may be maintained for such an injury appears to be authorized by section 1681 of the same title, for it provides that "If, during the pendency of an action specified in this title, the defendant commits waste upon, *or does any other damage* to the property in controversy, the court, or a judge thereof, may, upon the application of the plaintiff and due proof of the facts by affidavit, grant, without notice or security, an order restraining him from the commission of any further waste upon *or damage to the property*. Disobedience to such an order may be punished as a contempt of court. This section does not affect the plaintiff's right to a permanent or temporary injunction in such an action."

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It will be observed that the right to an injunction is not limited to wastes, but covers "any other damage to the property."

In the *Story* case, it was held that the owners of premises abutting upon a public street acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over the same for the benefit of their property; that the ownership of such easement is an interest in real estate constituting property within the meaning of the term as used in the Constitution of the state, and requires compensation to be made therefor before it can lawfully be taken from its owner for public use; that the right thus secured was an incorporeal hereditament, and became an appurtenant to the lot forming an integral part of the estate in it. From the moment it attached, the lot became the dominant and the street the servient tenement. (See also *Lahr v. M. E. R. Co.*, 104 N. Y. 268.)

In the case of *Kernochan v. N. Y. E. R. R. Co.* (128 N. Y. 559), ANDREWS, J., in delivering the opinion of the court, says that "The invasion of this incorporeal right by the structure of the elevated road is the gravamen of this and similar actions, and such an injury, although not a trespass upon the land, has throughout the course of common law been remediable by an action for damages technically known as an action for trespass on the case."

In that case it was held that the action could be maintained by the owner during the period in which the premises were in the occupation of a tenant under a lease for a term of years; and that the construction and operation of the road before any consummated right has been acquired by the defendants whereby the owner of abutting property is deprived of the full enjoyment of his property constitutes an injury to the inheritance.

We thus have the express provisions of the Code giving the right to a remainder-man to maintain an action founded upon an injury to the inheritance. We also have the adjudication

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in the *Kernochan* case that such an injury as is complained of in this case constitutes an injury to the inheritance.

It consequently follows that the action can be maintained.

In view of the fact that the authorities have been collated and considered in the *Kernochan* case, further discussion of the question is not deemed necessary.

No other question was presented for consideration.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THE FIRST NATIONAL BANK OF JERSEY CITY, Appellant, v.
ARCHIBALD LAMON, Impleaded, etc., Respondent.

In an action by a creditor of a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848), against its trustees to enforce the liability imposed by said act (§ 12), because of a failure to file an annual report in January, 1887, L., one of the defendants, claimed that he was not a trustee at that time. It appeared that L. was elected in 1880, and that no subsequent election was held; he testified that after the expiration of a year from his election he had nothing to do with its affairs, except to perform duties as foreman in its shop; that he never attended or was notified to attend any meeting of the trustees, and was never consulted by its officers. It appeared, however, that in December, 1886, in opposition to an application to the attorney-general to bring an action to dissolve the corporation, L. made and read an affidavit in which he stated that he was a trustee and referred to the others as his co-trustees; he reiterated this statement in an affidavit thereafter made to oppose the appointment of a receiver. L. testified in regard to these affidavits that he did not understand when he made them that he was making a statement that he was then a trustee, but supposed he had stated he was once a trustee. *Held*, that the question was one of fact and having been found against the defendant below, it was not reviewable here.

The claim of the plaintiff was upon notes given by the corporation in September and October, 1886, which did not mature until after January 20, 1887. The corporation stopped work in its shops and discharged its employes about December 15, 1886. About that time it borrowed a large sum of money giving a mortgage upon its property to secure it. L. testified that it was then solvent. The application to the attorney-general was made December 29, 1886, the ground of which did not

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appear. The action was commenced by him January 15, 1887. An order to show cause why a receiver should not be appointed was granted January 18 and a receiver was appointed March 7, 1887. The bringing of the action and the appointment of a receiver were opposed by two out of four trustees. *Held*, that the trustees were not, under the circumstances, relieved from the duty of filing the report in question.

Huguenot Bank v. Studwell (74 N. Y. 621); *Loose v. Bullard* (79 id. 404); *Bruce v. Platt* (80 id. 879); *Van Amburgh v. Baker* (81 id. 46); *Kirkland v. Kille* (99 id. 360), distinguished.

F. N. Bank v. Lamon (55 Hun, 414), reversed.

(Argued December 4, 1891; decided December 22, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 24, 1890, which reversed a judgment in favor of plaintiff entered upon the report of a referee, and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Hamilton Wallis for appellant. The respondent was a trustee at the time default was made in filing the annual report of the company. (*Read v. Keese*, 60 N. Y. 616; *Deming v. Buleston*, 55 N. Y. 655.) The trustees of the company had not been in any way relieved or excused from filing an annual report as required by law. (*H. Bank v. Studwell*, 74 N. Y. 621; *Sanborn v. Lefferts*, 58 id. 179.)

W. J. Townsend for respondent. The trustees were under no obligation to file a report in January, 1887. (*Bruce v. Platt*, 80 N. Y. 379; *Kirkland v. Kille*, 99 id. 390.) The defendant Lamon was not a trustee at the time of the alleged default. (*Bruce v. Platt*, 80 N. Y. 379; *Garrison v. Howe*, 17 id. 458; *Miller v. White*, 50 id. 137; *W. A. Co. v. Barlow*, 63 id. 62; *Van Amburg v. Baker*, 81 id. 46; *P. & R. C. & T. Co. v. Hotchkiss*, 82 id. 471; *Reed v. Keese*, 6 J. & S. 269; *Deming v. Puleston*, 1 id. 231.) Any admission, whether verbal or in writing, may always be explained and the fact shown to be otherwise, unless the party has acted upon the

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admission so as to present the question of estoppel which cannot be claimed in this case. (1 Taylor on Evidence, 709, § 819.)

BROWN, J. This action was brought by the plaintiff, a creditor of the Atlantic Steam Engine Works — a corporation organized under the General Manufacturing Act — to enforce a personal liability of the defendant as a trustee of such corporation for failure to file in January, 1887, the annual report required to be filed by the twelfth section of the act referred to.

Two defenses are made to the action : First, that the defendant was not a trustee of said corporation at the time of the default in filing the report ; and second, that the trustees were under no obligation to file a report in January, 1887.

It appeared upon the first defense that the defendant was elected a trustee in the year 1880. No subsequent election was ever held. He testified that after the expiration of a year from his election he had nothing to do with the affairs of the company other than to perform his duties as foreman of the shop, which consisted in laying out the work and hiring men. He never attended any meeting of the trustees, and was not notified to attend any, and was never consulted by the officers about any business of the corporation. It appeared, however, that in December, 1886, an application was made to the attorney-general to bring an action to dissolve the corporation, which was opposed by the defendant, and upon the hearing before that officer the defendant made and read an affidavit, in which he swore that he was a trustee of the corporation, and referred to the officers thereof as his co-trustees. That the attorney-general having commenced an action to dissolve the corporation, a motion was made therein for the appointment of a receiver, which motion was opposed by the defendant upon his affidavit, in which he reiterated the statement that he was a trustee. Upon the trial of this action the defendant testified that he did not understand when he signed and swore to said affidavits that he was making a statement that he was at that time a trustee, but intended to state, and

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supposed that he had stated, that he was once a trustee of the company.

The weight to be given to the defendant's explanation of the affidavits was for the trial court to determine. He was not bound to hold over after the expiration of the term for which he was elected, and he was not bound to act after that time, but he might, with the consent of the stockholders, do so. His affidavits were to the effect that he had held over, and the referee's conclusion having been adverse to the defendant, and the General Term not having reversed that finding, we cannot say that there is no evidence to sustain it. We must, therefore, accept as established, the fact that the defendant was a trustee at the time default is alleged in the filing of the report.

The General Term sustained the second defense. The facts upon which that defense rests are undisputed, and are as follows: The corporation ceased work in its shops between the 10th and 15th of December, 1886. The cause of the suspension is not stated. The buildings were locked and the men in its employ were discharged, and after that time no work of any kind was done.

On December twenty-ninth, application was made to the attorney-general by two of the four trustees to bring an action to dissolve the corporation. The hearing was adjourned to January 6, 1887, and on January fifteenth an action was commenced. Neither the grounds of the application to the attorney-general nor the grounds of the action commenced by him appear.

On January eighteenth an order was granted, returnable on the twentieth, to show cause why a receiver of the corporation should not be appointed, which order restrained creditors from issuing executions against the company's property, and on March 7, 1887, a receiver was appointed.

The question presented is, was the corporation, under the circumstances stated, relieved from making and filing the annual report.

This court has decided that on the appointment of a receiver

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of a manufacturing company, the corporation is so far dissolved that thereafter the duty is no longer upon the trustees to make the report (*Huguenot Bank v. Studwell*, 74 N. Y. 621), and that when the corporation has been practically abandoned, the requirement as to filing reports does not apply to the trustees. (*Losee v. Bullard*, 79 N. Y. 404; *Bruce v. Platt*, 80 id. 379; *Van Amburgh v. Baker*, 81 id. 46.)

In *Losee v. Bullard* the default was alleged to have been made in 1873, and it appeared that the corporation had suspended business in 1865, and never resumed and had contracted no debts after that time.

In *Bruce v. Platt* the alleged default was in January, 1875, but more than a year previous all the property of the corporation had been sold under execution and from that time the corporation had no property or business, no means of procuring money and no ability or intention of resuming business.

The result of these cases is summed up by Judge DANFORTH in *Kirkland v. Kille* (99 N. Y. 390-395) as follows: When the condition of the company is such that the end and object for which it was formed are destroyed and there is neither an ability or intention on its part at any time to further prosecute its business, it is no longer required to make the report mentioned in section 12 of the Manufacturing Act.

This case does not fall within the rules enunciated in any of the cases cited. The corporation was not in the hands of a receiver at the time of the default. Nor does the evidence show that it was insolvent. Nor had its franchises been abandoned. On the contrary it appears that the notes held by the plaintiff had been given in September and October, 1886, and matured subsequent to January 20, 1887, and up to December fifteen it was engaged actively in the prosecution of its business.

At the time it closed its shops the defendant testified that it owned real estate and other property of the value of sixty thousand dollars and about the same time it borrowed a large sum of money from the Brooklyn Bank and gave a mortgage to secure such loan upon its property and that it was then solvent and had a large surplus over and above its debts.

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The action to dissolve the corporation was opposed by two out of the four trustees and there is nothing in the evidence to indicate that the object for which it was formed was destroyed or abandoned or that there was not ability to resume its business.

Under these circumstances the trustees were not relieved from the duty imposed by the statute to file the annual report.

In *Sanborn v. Lefferts* (58 N. Y. 179), the defendant was sued as a trustee for failure to file a report in January, 1870. It appeared that in October, 1869, the trustees had resolved to discontinue business owing to the embarrassed condition of the company and wind up its affairs and that in the early part of January its property was sold.

This court decided that these facts did not exempt the trustees from the statutory consequence of a failure to file the prescribed report.

The facts in *Sanborn v. Lefferts*, were stronger for the defendant than in the case before us. Here there was no action by the corporation with a view to the discontinuance of business or abandonment of its franchise, nor was there acquiescence in such a course by the trustees or stockholders, and we are of the opinion that the mere fact of an application by the attorney-general at the instance of two of the trustees for a dissolution of the corporation upon grounds undisclosed so far as this action is concerned, and in view of the active opposition thereto by half of the trustees, did not relieve them from the duty of making and filing the annual report.

The order of the General Term should be reversed and the judgment entered on the referee's report affirmed.

All concur, except PORTER, J., not voting.

Order reversed and judgment affirmed.

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OLIVER W. BARNES, Respondent and Appellant, v. GEORGE W. BROWN, Appellant, et al., Respondents.

Upon the death of one of two joint contractors, the primary liability for a breach of the contract rests upon the survivor, and in order to maintain an action against him and the personal representatives of the decedent jointly, the complaint must allege that the latter is insolvent or unable to pay.

In case of the omission of such an averment the defect may be availed of by objection on the trial.

A plaintiff is not entitled to an amendment of his complaint in this respect on trial before a referee, as a matter of right, and the exercise of his discretion by the referee, in denying the amendment, is not reviewable here.

Plaintiff entered into a contract with B. & S. by which the latter, for a valuable consideration, agreed, among other things, to assign to plaintiff 2,000 shares of the capital stock of a certain corporation, said stock "to be full paid stock." B. & S. transferred to plaintiff certificates for the specified number of shares, but it was not full paid stock. On discovery of this plaintiff tendered back the certificates and demanded full paid stock, which was refused. In an action to recover damages for breach of the contract, it appeared and the referee found that the stock had no actual or market value at the time when B. & S. undertook to deliver. *Held*, that plaintiff was only entitled to recover nominal damages; that it was immaterial that defendants, in order to perform the contract, would have been compelled to pay par for the stock, as plaintiff was simply entitled to recover a sum which would indemnify him for the loss he had suffered by the default.

Scattergood v. Wood (14 Hun, 269; 79 N. Y. 263), distinguished.

Barnes v. Brown (55 Hun, 839), reversed as to defendant Brown.

(Argued November 30, 1891; decided January 20, 1892.)

APPEAL by the defendant Brown from order of the General Term of the Supreme Court in the first judicial department, made February 3, 1890, which reversed a judgment in his favor entered upon the report of a referee and granted a new trial. Also appeal by the plaintiff from judgment of the same General Term, entered upon the same order, which modified and affirmed as modified a judgment in favor of the defendants Seligman entered upon the report of a referee.

This action was brought to recover damages for the alleged breach of a contract, of which the following is a copy, to wit:

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“ Oliver W. Barnes having by instruments bearing even date herewith, assigned and transferred to us, George H. Brown and Joseph Seligman, all claims and demands against the New York City Central Underground Railway Company, and his title to certain subscriptions to the capital stock of said company, and also any interest he may have in a certain alleged contract made with the said company by Francis P. Byrne, and having also transferred sixty shares of stock in said company. Now, we, George H. Brown and Joseph Seligman, do hereby, in consideration of the premises and of one dollar to us paid by the said Oliver W. Barnes, agree that we will, upon certain amendments to the charter of the said New York City Central Underground Railway Company, now pending before the legislature of the state of New York, becoming a law, pay or cause to be paid to the said Oliver W. Barnes, his representatives and assigns, the sum of twenty-seven thousand five hundred dollars in currency of the United States, being the amount of certain advances made and services rendered by the said Barnes to the said railway company. And also that we will cause to be delivered to the said Barnes, or his assigns, at the time of the payment of the said money, two thousand shares of the capital stock of the said railway company, which said stock is to be full paid stock.

“ And we further agree with the said Oliver W. Barnes, his representatives and assigns, that in the event of the said amendments not becoming a law at the present session of the legislature, we will either cause said money to be paid and said two thousand shares of stock delivered to the said Barnes, or his assigns, or have reassigned to the said Barnes, or his assigns, the claims, demands and rights so assigned to us, and transfer to him or his assigns the said sixty shares of stock so transferred to us the next day after the close of the present session of the legislature of New York. And we further agree that not more than one hundred additional shares of the stock of said company shall be issued until the said payment be made and stock delivered without the consent of the said Barnes, and that so much of said one hundred shares as shall be issued

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shall be transferred to the said Barnes, if we do not exercise our option of paying said twenty-seven thousand five hundred dollars, and delivering said two thousand shares on the failure of the said amendments to become a law at the present session. And we further agree that no contract for the construction of the railway of the company shall be entered into without the consent of the said Barnes, until the said money shall be paid and the stock delivered.

“In witness whereof, we have hereunto set our hands and seals, this twenty-sixth day of March, in the year one thousand eight hundred and seventy-two.

“GEORGE H. BROWN. [L. s.]

“JOSEPH SELIGMAN. [L. s.]”

When in 1882 this action was commenced, Joseph Seligman had died, and executors of his will were joined as defendants with Brown. The alleged default was in the failure or refusal to deliver to the plaintiff the two thousand shares of the stock of the railway company, as Brown and Seligman had undertaken by the contract. The plaintiff sought to recover \$200,000 and interest. The referee found that the stock had no value, and directed judgment against Brown for nominal or six cents damages; and as to the defendants, executors, the referee directed judgment of dismissal of complaint. Judgments were entered accordingly. The General Term affirmed the latter, and reversed the judgment for nominal damages, and as to the defendant Brown granted a new trial.

Further facts appear in the opinion.

John E. Parsons for appellant Brown and respondent Seligman. Plaintiff cannot complain of error in the rulings of the referee. (*Parsons v. Sutton*, 66 N. Y. 92, 96; *Gumb v. T. T. S. R. Co.*, 114 id. 411; *Uransky v. D. D., E. B. & B. R. Co.*, 118 id. 304; *Uertz v. S. M. Co.*, 35 Hun, 116; *Saffer v. D. D., E. B. & B. R. R. Co.*, 24 N. Y. S. R. 210; Code Civ. Pro. § 1338; *Ward v. Craig*, 87 N. Y. 550; *R. L. R. Co. v. Roach*, 97 id. 378; *Inglehart v. T. I. H. Co.*, 109 id.

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454; *Clemons v. Davis*, 4 Hun, 260; *Coster v. City of Albany*, 43 N. Y. 399, 402-404; *Van Cott v. Van Brunt*, 82 id. 535; *Gamble v. Q. C. W. Co.*, 123 id. 91; *Clark v. Bever*, 139 U. S. 96.) If it be assumed that the plaintiff may demand as damages the cost of procuring the 2,000 shares, and that such cost would be \$200,000, there is no rule or principle known to the law which supports his claim for that amount, or entitles him to anything more than that which his complaint demanded, the value of the stock. (*Ormsby v. V. C. M. Co.*, 56 N. Y. 623; *Tyng v. C. W. Co.*, 58 id. 308, 314; *M. & T. Bank v. F. & M. Bank*, 60 id. 40, 50; *Whelan v. Lynch*, 60 id. 469, 472; *Prince v. Connor*, 69 id. 608; *Wehle v. Haviland*, Id. 448; *Thayer v. Manley*, 73 id. 305, 308; *Gruman v. Smith*, 81 id. 25; *Colt v. Owens*, 90 id. 368; *Wright v. Bank*, 110 id. 237; 1 Sedg. on Dam. [8th ed.] §§ 243, 244, 257; *Gruman v. Smith*, 81 N. Y. 25; *Dwyer v. Rich*, 1 Metc. 180; *Porter v. B. B. R. R. Co.*, 32 Me. 539; *Fosdick v. Green*, 27 Ohio St. 484; *Murray v. Stanton*, 99 Mass. 345; Pom. on Spec. Perf. § 12; *Cushman v. T. M. J. Co.*, 76 N. Y. 365; Pom. Eq. Juris. § 1401; *Conger v. N. Y., W. S. & B. R. R. Co.*, 120 N. Y. 29; *Chellis v. Chapman*, 125 id. 214.) If the plaintiff had paid \$200,000 to the company, and thus obtained the 2,000 shares of full paid stock, neither would it have changed the rule of damage, nor on any theory or rule recognized by the courts have entitled him to recover the sum paid. (*Baker v. Drake*, 53 N. Y. 211; *Wright v. Bank of Metropolis*, 110 id. 237; *Loker v. Damon*, 17 Pick. 284; *Hogle v. N. Y. C. & H. R. R. R. Co.*, 28 Hun, 363.) The complaint states no cause of action against the executors of Joseph Seligman, inasmuch as it contains no allegation of inability to procure satisfaction from the co-defendant Brown. (2 Chitty on Cont. 1353; 1 Pars. on Cont. 11, 12, 30; *Getty v. Binsse*, 49 N. Y. 385; *Lane v. Doty*, 4 Barb. 530; Pom. Eq. Juris. § 409; *Voorhis v. Child*, 17 N. Y. 354; *Richter v. Poppenhausen*, 42 id. 373; *Hoyt v. Bonnett*, 50 id. 538; *Pope v. Cole*, 55 id. 124; *Hauck v. Craighead*, 67 id. 432; *Smith v. Ballantine*,

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10 Paige, 101; *Voorhis v. Baxter*, 1 Abb. Pr. 13; *Lyon v. Park*, 111 N. Y. 350; *Jarvis v. Jarvis*, 3 Edw. Ch. 462; *Dash v. Van Kleeck*, 7 Johns. 477; *Sackett v. Andross*, 5 Hill, 327, 334; *Trist v. Cabenas*, 18 Abb. Pr. 143, 146; *People v. Marshall*, 7 Abb. [N. C.] 380, 382; *Sanford v. Bennett*, 24 N. Y. 20, 23; *People v. Supervisors*, 43 id. 130, 135; *Benton v. Wickwire*, 54 id. 226; *N. Y. & O. M. R. R. Co. v. Van Horn*, 57 id. 477, 478; *McMaster v. State*, 103 id. 547, 554; *Johnson v. Burrell*, 2 Hill, 238; *Calkins v. Calkins*, 3 Barb. 305; *McMannis v. Butler*, 49 Barb. 176; *Sayre v. Wisner*, 8 Wend. 661; *Stone v. Flower*, 47 N. Y. 566; *Goillotel v. Mayor, etc.*, 87 id. 441; *Bradley v. Burwell*, 3 Den. 61; *Cornes v. Wilkin*, 14 Hun, 428; *Johnson v. Harvey*, 84 N. Y. 363; *Bronson v. Kinzie*, 1 How. Pr. 311, 316; *Brine v. Ins. Co.*, 96 U. S. 627; Story on Const. § 1385.) Plaintiff's motion to amend the complaint was properly denied. (*Hendricks v. Decker*, 35 Barb. 302; *Ross v. Schloss*, 6 id. 308; *Guiterman v. Steamship Co.*, 9 Daly, 124; *May v. Burras*, 13 Abb. [N. C.] 388; *Robbins v. Richardson*, 2 Bosw. 248; *B. F. Co. v. Allen*, 12 Civ. Pro. Rep. 71; *King v. Barnes*, 107 N. Y. 645; *Smith v. Rathburn*, 75 id. 122; *Bennett v. Lake*, 47 id. 93; *Gambling v. Haight*, 58 id. 623; *Lane v. Doty*, 4 Barb. 530; *Brown v. Babcock*, 3 How. Pr. 305; *Morehouse v. Ballou*, 16 Barb. 289; *Union Bank v. Mott*, 27 N. Y. 633.)

Hamilton Odell for appellant. Plaintiff was entitled to recover only nominal damages against the defendant Brown. (Sedg. on Dam. 200; *McKnight v. Dunlop*, 5 N. Y. 537; *Pollen v. LeRoy*, 30 id. 549; *Wilson v. Martin*, 1 Den. 601; *Dana v. Fiedler*, 12 N. Y. 40; *Fosdick v. Green*, 27 Ohio, 484; *Robinson v. Noble*, 8 Pet. 181; *Conaughty v. S. C. Bank*, 93 N. Y. 401; *Quinn v. Van Pelt*, 56 id. 417; *Thayer v. Manley*, 73 id. 305; 56 id. 417; *Hamilton v. McPherson*, 28 id. 76; *Hecksher v. McRue*, 24 Wend. 304; *Clark v. Masiglia*, 1 Den. 317; *Dillon v. Anderson*, 43 N. Y. 231; *Howard v. Daly*, 61 id. 362; *Polk v. Daly*, 14 Abb. [N. S.]

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156; *Parsons v. Sutton*, 66 N. Y. 92; 4 Daly, 258.) The testimony offered by the defendants as to the value of the underground company stock was proper. (*Scattergood v. Wood*, 79 N. Y. 263; *Hollender v. N. Y. C. Co.*, 19 Abb. [N. C.] 20.)

Edward C. James and *Ira Leo Bamberger* for respondent. Barnes. The learned referee erred in the measure of damages. (*Baker v. Drake*, 53 N. Y. 211, 220-223; *Thayer v. Manley*, 73 id. 307, 308; *Wright v. Bank*, 110 id. 237, 246; *West v. Wentworth*, 3 Cow. 82; *Clark v. Pinney*, 7 id. 396; *Kortwright v. C. Bank*, 20 Wend. 91; 22 id. 348; *Arnold v. S. Bank*, 25 Barb. 424; *Van Allen v. I. C. R. R. Co.*, 7 Bosw. 515, 537; 4 Abb. Ct. App. Dec. 443; *Colt v. Owens*, 90 N. Y. 368; *M. & T. Bank v. F. & M. Bank*, 60 id. 40, 50; *Whelan v. Lynch*, Id. 469, 472; *Prince v. Connor*, 69 id. 608; *Wehle v. Haviland*, Id. 438; *Gruman v. Smith*, 81 id. 25; *Nash v. Towne*, 5 Wall. 689, 699; *Knapp v. Warner*, 57 N. Y. 688; *Clark v. Ins. Co.*, 64 id. 33, 38, 39; *Bates v. C. V., etc., R. R. Co.*, 3 T. & C. 16; 59 N. Y. 641; *Pinney v. Gleason*, 5 Wend. 393; *Gilbert v. Danforth*, 6 N. Y. 585; *Fletcher v. Derrickson*, 3 Bosw. 181, 188; *Stephens v. Howe*, 2 J. & S. 133; *Murray v. Hamson*, 47 Barb. 492, 493; *Puesey v. N. J., etc., R. R. Co.*, 114 Abb. [N. S.] 434; *Wakeman v. W. & W. M. Co.*, 101 N. Y. 205.) The referee decided that, as Brown and Seligman were joint contractors, a joint action against the survivor and the executors of the deceased would not lie, without an allegation in the complaint, supported by proof on the trial, of the insolvency of the survivor, and of the plaintiff's inability to collect his claim from him. Accordingly he held that as to these executors the complaint should be dismissed. This was error. (*Quackenboss v. Lansing*, 6 Johns. 49; *Ernst v. Bartle*, 1 Johns. Cas. 319; *Sandford v. Halsey*, 2 Den. 264; *Thorpe v. Jackson*, 2 Y. & C. 553; *De Agreda v. Mantel*, 1 Abb. Pr. 139.) The objection that a cause of action against these executors was improperly joined with a cause of action against the surviving vendee,

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appeared upon the face of the complaint and should have been taken by demurrer. (Code Civ. Pro. §§ 447, 452, 488, 499; *Sullivan v. R. R. Co.*, 119 N. Y. 348; *Hilck v. Reinheimer*, 105 id. 473; *Barnard v. Onderdonk*, 98 id. 158; *Barker v. Cocks*, 50 id. 689.) The decision of a referee, denying leave to amend, will be reviewed and reversed when general justice will be promoted and future litigation prevented thereby. (*Coates v. Donnell*, 16 J. & S. 46, 69; *Beck v. Allison*, 56 N. Y. 366; *Stahl v. Stahl*, 2 Lans. 60; *Yorks v. Peck*, 14 Barb. 644; *Van Riper v. Poppenhausen*, 43 N. Y. 68; *Bank v. Morgan*, 6 Hun, 346; 73 N. Y. 593.) Mr. Seligman did not die until after the Code of Civil Procedure took effect. If this action had been brought against him and Brown before his death, it is clear that the court, under §§ 758, 452, could have revived it against his executors, and brought them in as co-defendants with Brown after his death. This being so, the action can be brought, after his death, against his executors as co-defendants with Brown in the first instance. The right, in each case, depends upon exactly the same principle, not upon the circumstances whether the death occurred before or after the commencement of the action. (*In re Trustees, etc.*, 31 N. Y. 574, 585; *Morse v. Gould*, 11 id. 281; *Van Rensselaer v. Snyder*, 13 id. 299; *Van Rensselaer v. Ball*, 19 id. 100; *De Agreda v. Mantel*, 1 Abb. Pr. 138; *Voorhis v. Child*, 17 N. Y. 354; *Master v. Blackwell*, 8 Hun, 313; *Randall v. Sackett*, 77 N. Y. 480; *Stocking v. Hunt*, 3 Den. 274.)

BRADLEY, J. The main controversy has relation to the rule or measure of damages applicable to the breach of the contract upon which this action was founded. While the plaintiff claims that damages cannot be less than two hundred thousand dollars and interest, it is insisted on the part of the defense that they were only nominal. Before proceeding to the consideration of the question in that respect, reference may properly be made to the facts out of which the alleged claim arose. The New York City Central Underground Railway Company was organized under an act incorporating it and

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authorizing the company to construct and operate an underground railway in the city of New York, passed in 1868 and amended in 1869. The authorized capital stock of the company was ten millions dollars. At the time the contract of March 26, 1872, was made, the plaintiff was president of the company. He then had some claims against it; and only one hundred and seventeen shares of capital stock had been issued, of which he held sixty-three shares. By the transfer of the sixty shares to Brown and Seligman, they took the control of the organization of the company. The amendments to the charter then pending in the legislature did not become a law, and consequently it was optional with them to either retain their purchase and pay, or surrender what they had received and put an end to the contract. They, however, concluded to treat it as effectual and assumed the undertaking to perform, and afterwards did pay to the plaintiff the twenty-seven thousand and five hundred dollars, and did deliver to the plaintiff certificates of two thousand shares of the capital stock of the company. This was, apparently, full performance, but in fact was not, because that so delivered was not paid stock. And when this was discovered by the plaintiff he offered to return the certificates and demanded such as he was entitled to. Further performance was refused, and this action followed. The only question as against the defendant Brown was one of damages, and the referee found that at the time when he and Seligman undertook to deliver the stock to plaintiff it had no actual or market value, and determined that he was entitled to recover nominal damages only. The stock certainly had no market value. None was in the market. This finding and conclusion were challenged by the plaintiff's exceptions. By reference to the condition of the company it is seen that the total amount of money received by it on account of subscriptions to its stock was five thousand seven hundred dollars, and that was received in 1869 and 1871. The other credits to the capital stock account were in demand loans and special services rendered the company. The various efforts prior to 1872 were unsuccessfully made to raise money for the

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purpose of construction of the railway, and the reason why the bonds of the company could not be negotiated was that it had been unable to obtain subscriptions to its capital stock to pay for right of way. The land and consequential damages incident to the construction of the railway were estimated at five millions dollars; and the expenditures by the company for work done towards construction and for land and land damages did not exceed four thousand dollars. The indebtedness of the company was about three hundred and fifty thousand dollars. This was in general terms the situation of the company when the contract of March 26, 1872, was made; and it was known as well to Brown and Seligman as to the plaintiff. Whatever of value they took by the contract was in the franchise of the company, and was dependent upon the use which could be made of it by way of the construction and operation of an underground railway. While the futility of the enterprise tended to show that it never had any actual value, there evidently was hope and expectation of success entertained by Brown and Seligman when they elected to retain the benefit of the contract, and it is in that view insisted by the plaintiff that the stock then had a value which to him may at that time have been available, although later it turned out to have had none, and, therefore, he lost whatever he may have realized by its conversion if it had in due time been delivered to him. There is apparently some force in this suggestion, but it is entirely speculative, assuming that the stock then in fact had no actual value as well as no market value. There was some conflict in the expert evidence upon the subject founded upon the situation of the company. While that on the part of the defendants was that the stock had no value, that of the witnesses called by the plaintiff was to the effect that it was as the situation then appeared, worth par. It may be observed that the plaintiff held the stock represented by the certificate so delivered to him until about September 1, 1874, upon the assumption that it was full paid stock before his discovery that it was otherwise.

The finding of the referee that the stock had neither actual

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nor market value was supported by evidence, and for the purpose of this review must be deemed conclusive. But it is insisted by the learned counsel for the plaintiff that the plaintiff should nevertheless have recovered the two hundred thousand dollars and interest upon it because he was entitled to the stock or to a sum which it would cost to obtain it. As a general rule, the damages which a party is entitled to recover against another for a breach of contract are such as will indemnify him for the loss he has suffered by the default. And it is with a view to that result that the rules for ascertaining and awarding damages have been adopted. The purpose of the rule in that respect is to leave the party in no worse, and place him in no better, condition than he would have been if the act or default complained of had not been committed.

It was with a view to such measure of relief, and the adoption of a rule to accomplish it, that the doctrine which gave the highest market value up to the time of the trial as the measure of damages for conversion of property of fluctuating value, as held in *Markham v. Jaudon* (41 N. Y. 235) and some prior cases, was overruled in *Baker v. Drake* (53 N. Y. 211), and the market value for a reasonable time within which to replace the property was adopted as furnishing the guide to the proper measure of damages and the more satisfactory means of indemnity. In that case the defendants, pursuant to an arrangement with the plaintiff, had purchased stocks to hold and carry subject to his order, so long as he kept his margin good. The defendants disposed of the stock in violation of the agreement. And the court there held, substantially, that an amount sufficient to indemnify a party injured for the loss, naturally, reasonably and proximately resulting from the act complained of, and which a proper degree of prudence on the part of the complainant would not have averted, is the proper measure of recovery when punitive damages are not allowable. And that "the advance in the market price of the stock, from the time of the sale up to a reasonable time to replace it after the plaintiff received notice of the sale, would afford a complete indemnity."

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The principle upon which the determination of *Baker v. Drake* rested was that the measure of the plaintiff's damages was governed by the opportunity which was afforded by the market for him within a reasonable time to replace the stock on the refusal of the defendant to do so. (*S. C.*, 66 N. Y. 518; *Colt v. Ownes*, 90 id. 368.) And in *Wright v. Bank of the Metropolis* (110 N. Y. 237), the same rule was held in like manner applicable where stock fully paid for by the owner is through the honest mistake of the pledgee converted by him, and he refuses to replace it. Thereupon the owner may do so within a reasonable time, and the highest market price within that time is the proper measure of damages. This is the recognized rule in this state; and it is applicable alike to actions upon contract as in tort.

In the present case there was no market to resort to for the plaintiff to supply himself with the stock, nor any market value to furnish the measure of damages. The rule applied in the cases last cited was not, therefore, in that sense applicable to the situation in the case at bar. A subscription, however, to two thousand shares of the capital stock of the railway company, and payment of the full amount to the company, would have produced the stock, and it may be assumed that it could not otherwise have been procured. It is upon that ground that the plaintiff insists that the liability of the defendant is measured by that amount. This would have been so if the agreement of Brown and Seligman had been to pay the plaintiff two hundred thousand dollars in the stock of the company. Then their indebtedness or liability would not have been controlled by the value of the stock, but would have been fixed by the contract, but when the specific *quantum* of the stock was made the consideration in that respect for the plaintiff's sale to them, on their failure to deliver it, he was entitled in damages to the equivalent of that which they had undertaken to render.

In the absence of special circumstances in an action for conversion of personal property as well as one for failure to deliver it in performance of a contract where consideration

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has been received, the value of the property at the time of such conversion or default, with interest, is the measure of compensation. (*Ormsby v. Vermont, etc., Co.*, 56 N. Y. 623; *Parsons v. Sutton*, 66 id. 92.) No special circumstances were alleged in the complaint to take this case out of the general rule. Nor was there any fluctuation in the value of the stock succeeding the time for its delivery under the contract to qualify the application of such rule.

The damages which a party ordinarily may recover for breach of contract are those which naturally flow from the default. And if the contract is made in reference to special circumstances affecting the measure of compensation, such circumstances may be treated as within the contemplation of the parties and constitute a basis for the assessment of damages. (*Booth v. Spuyten Duyvel R. M. Co.*, 60 N. Y. 487.) They come within the meaning of special damages, and must be the subject of allegation in pleading to entitle the party to make proof of them, unless objection in that respect be waived. In the present case no facts of special character relating to damages were alleged, nor were any established by the evidence further than the mere fact that the stock of the company had no market value. If, notwithstanding that fact, the stock may have had an actual value, a different question would have been presented, for the plaintiff could not be subjected to loss, nor could the defendant be permitted to profit by the fact that the stock had no market value at the stipulated time for delivery. Then other means than those afforded by the market would be resorted to under the contract, as within the contemplation of the parties, to ascertain the amount requisite to full indemnity to the plaintiff. (*Sternfels v. Clark*, 2 Hun, 122; 70 N. Y. 608.)

There may be cases in which damages have no support in market values where the value is peculiar to the party entitled to performance, and relief will be given accordingly. (*Scattergood v. Wood*, 14 Hun, 269; 79 N. Y. 263; *Parsons v. Sutton*, 66 id. 92.) And when the remedy at law for compensation is inadequate or impracticable, it may be found in

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equity by way of specific performance. (Pom. Eq. Jur. § 1401.) Those are supposed cases to which the principles of law adapt remedies when they arise. But in the case at bar, the stock not only had no market value, it also had no actual value. Nor does it appear that it would have been of any value to the plaintiff, or of any substantial benefit to him for any purpose if he had received it. The defendant Brown and his associate Seligman did not by the contract undertake to do anything to give any future value to the stock of the company. Thus we have the simple case of a contract to deliver a certificate for a certain quantity of capital stock then having no existence, and when due and thereafter having no value. The claim that because the creation or issue of this worthless stock would cost its par value the plaintiff is entitled to recover that sum, does not seem to have the support of any well-defined principle of law. But it is said that with knowledge of the situation, Brown and his associate absolutely agreed to deliver the stock and, therefore, they were bound to pay the amount requisite to accomplish it without regard to the value of the stock or of its beneficial use to the plaintiff.

In an action at law to recover damages for breach of contract, the question of damages is one of indemnity. And in that respect the remedy founded upon this contract does not differ from that upon any other contract for default in the delivery of property which a party has unqualifiedly undertaken to deliver for a consideration received.

In *Dana v. Fiedler* (12 N. Y. 40), the measure of damages for failure to deliver madder pursuant to contract, was founded upon the market value at the time of the default. The question there arose upon the exclusion of evidence, speculative in character, and which for that reason was held inadmissible upon the question of such value.

Nor does *Scattergood v. Wood* have any essential application in principle to the case at bar. In that case there was an element of exemplary damages against the defendant, who had wilfully deprived the plaintiff of the use of a test machine designed by him for a special purpose, in consequence of which

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he was put to the expense of constructing another for such purpose. Of this intended use the defendant was advised when he appropriated and withheld the machine from the plaintiff. The recovery of the expense of constructing the second one, as damage for the detention of the other, was sustained, although by reason (as it turned out) of its insufficiency, the value of the latter was much less than such cost.

In the present case the action is founded solely upon the failure to deliver to the plaintiff the stock without any supported claim of special circumstances for any damages other than such as flow naturally and reasonably from such default of Brown and Seligman. While the performance of their contract in that respect may have required them to pay to the company two hundred thousand dollars, the entire value of its performance to the plaintiff was in the stock, which they undertook to deliver to him, and this was the only benefit he was entitled to take under that provision of the contract. The value of the stock, or its pecuniary equivalent, was the measure of his injury by the default. And as it had no value, the plaintiff was awarded complete indemnity by the conclusion of the referee that he was entitled to recover nominal damages only.

There was no error in the ruling of the referee by which evidence of value of the stock was received. The complaint alleged that on January 22, 1873, when the plaintiff accepted the certificate before mentioned of stock in performance of the contract, the stock of the company was worth, and salable in the market at its full par or face value, and demanded judgment for that amount and interest from January 23, 1873. This was the situation of the complaint when the evidence upon the question of value was given. And the plaintiff, upon a state of facts embraced in a hypothetical question, called upon the witnesses to state the value of the stock in January, 1873. This was the time when, by the issue tendered in the complaint and taken by the answer, the value of the stock was, by the pleadings, brought in question. And it may be observed that the assumed facts upon which the answers of the wit-

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nesses were predicated, were the same and no different at that time than they were on the day when the contract matured.

These views lead to the conclusion that, as to the defendant Brown, the judgment directed by the referee should be sustained. But as the order granting an additional allowance of costs to that defendant may be deemed to have been reversed at General Term, that disposition of the order is affirmed, and the costs recovered treated as reduced accordingly.

The contract was the joint undertaking of Brown and Seligman. The latter having died before the action was commenced, his personal representatives were joined as defendants with Brown. The complaint was as to those executors dismissed by the referee upon the ground that facts sufficient to constitute a cause of action against them were not alleged. Their testator having only the relation of joint contractor with Brown, his death placed the primary liability upon the latter, unless he was unable to pay or insolvent. Upon that fact the liability of those personal representatives to the plaintiff upon the contract was dependent, and that fact was essential to the cause of action against them. (*Grant v. Shurter*, 1 Wendell, 148; *Trustees, etc., Orphan House v. Lawrence*, 11 Paige, 80; 2 Denio, 577; *People v. Cole*, 55 N. Y. 124, and cases there cited; *Hauck v. Craighead*, 67 id. 432.) It was not alleged. This defect was available by objection, which was taken at the trial. (Code, § 499.)

It does not appear on what ground the motion to amend the complaint was denied. The plaintiff was not entitled to it as matter of right. And the discretionary power of the referee, exercised in denying the amendment, is not the subject of review here.

The judgment in favor of the defendant Seligman, as modified by the General Term, should be affirmed. And the order reversing the judgment and granting a new trial, as against defendant Brown, should be reversed, and the judgment entered upon the report of the referee (after deducting therefrom the amount of the additional allowance of costs) affirmed.

All concur.

Judgment accordingly.

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RUDOLPH HOFFELD, Appellant, v. THE CITY OF BUFFALO,
Respondent.

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154	579

Where, in an action to have an assessment for a local improvement upon plaintiff's land in the city of Buffalo adjudged illegal and to restrain its collection, it was not claimed that any land outside the district upon which the assessment was made should have been included, nor was any fraud upon the part of the assessors alleged, but the claim was, and it was found by the trial court, that the assessment upon plaintiff's land was largely in excess of its proportionate benefit, *held*, that the action was not maintainable; that while the facts might have entitled plaintiff to relief upon review by certiorari, as the matter was one within the jurisdiction of the assessors under the city charter (§§ 1, 2, 3, tit. 6, chap. 519, Laws of 1870), a mere error of judgment on their part furnished no support for collateral attack by action.

It was conceded on the trial and the court found that the assessors in making the assessments disregarded the value of buildings or other improvements upon the respective parcels of land assessed "for the reason that they determined that the amount of benefits was not affected by the improvements." *Held*, that this did not show that the assessors proceeded upon a wrong rule of law, but was simply a determination as to what property was in fact benefited, and the error, if any, was one of judgment.

Clark v. Village of Dunkirk (12 Hun, 181; 75 N. Y. 612), distinguished.

(Argued December 7, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made December 30, 1889, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

E. C. Sprague for appellant. The assessment is illegal and voidable. (1 Desty on Taxn. 528, §§ 4, 10; *Clark v. Village of Dunkirk*, 12 Hun, 181; *Savage v. City of Buffalo*, 59 id. 606; *Le Roy v. Mayor, etc.*, 20 Johns. 429; *People v. Jefferson Co.*, 55 N. Y. 604; *In re Cruger*, 34 id. 619; *People v. City of Brooklyn*, 23 Barb. 166; *Stuart v. Palmer*, 74

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N. Y. 183; *Litchfield v. Vernon*, 41 id. 123; *Genet v. City of Brooklyn*, 99 id. 296; *Spencer v. Merchant*, 100 id. 585; *Hassan v. City of Rochester*, 65 id. 516; *Baldwin v. City of Buffalo*, 29 Barb. 296; *Johnson v. City of Milwaukee*, 40 Wis. 315; *Preston v. Roberts*, 12 Bush. 570; Cooley on Taxn. 662; *Sutton v. City of Louisville*, 12 Bush. 419; *Motz v. City of Detroit*, 18 Mich. 495; *State v. Mayor, etc.*, 6 Vroom. 157; Cooley on Taxn. 662; *Hammet v. City of Philadelphia*, 165 Penn. St. 146; *State v. Mayor, etc.*, 37 N. J. L. 415; *Creighton v. Manson*, 27 Cal. 613; *H. R. R. Co. v. Morton*, 27 Mo. 317; Mills on Em. Domain, §§ 159, 232, 246; *Reitenbaugh v. C. R. R. Co.*, 21 Penn. St. 100.) The assessment was illegal, being made upon a wrong principle, because the assessors in making the same determined that the amount of benefits was not affected by improvements, and fixed the amount of their assessment without regard to such improvements. (*Clark v. Village of Dunkirk*, 12 Hun, 181; *Kennedy v. City of Troy*, 77 N. Y. 493; *Canal Bank v. Mayor, etc.*, 9 Wend. 214.) That the plaintiff is entitled to the relief demanded, if the assessment is illegal, is beyond question, the illegalities complained of not appearing upon the face of the record. The remedy at law in such cases, by certiorari or otherwise, is not exclusive. (*Scott v. Onderdonk*, 14 N. Y. 9; *Allen v. City of Buffalo*, 39 id. 386; *Rumsey v. City of Buffalo*, 97 id. 114; Laws of 1864, chap. 438; Laws of 1865, chap. 358; Laws of 1870, 1192, § 20; Laws of 1880, 413, § 9; *People v. Gilon*, 126 N. Y. 147-151; *People v. McGuire*, Id. 419.) The court should take jurisdiction of this action, because the remedy at law, by certiorari, was entirely inadequate as applied to this assessment, if the errors in the assessment are so gross and palpable as to justify equitable relief on general principles, although they do not render the assessment absolutely illegal. (Code Civ. Pro. §§ 2140, 2141; *People v. Comrs.*, 9 Hun, 609; *People v. Supervisors, etc.*, 82 N. Y. 275; *People v. Mayor, etc.*, 20 Hun, 73; *People v. Dunkirk*, 38 id. 7; *People v. Tompkins*, 40 id. 228; *People v. Delaney*, 49 N. Y. 655; *People v. McDonald*, 4 Hun, 187;

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69 N. Y. 362; *Bank v. Supervisors, etc.*, 25 id. 312.) This action is maintainable. (Laws of 1864, chap. 438; Laws of 1865, chap. 358; Laws of 1870, 1221, § 20; Laws of 1880, 275, § 9; Laws of 1870, 1192, § 20.)

George M. Brown and Philip A. Laing for respondent. The assessors had jurisdiction and the *quantum* of benefits was a question of fact for their determination under the defendant's charter; such determination is in the nature of a judgment and is not reviewable collaterally. (*O'Reilley v. City of Kingston*, 114 N. Y. 440; *In re Kruger*, 84 id. 621; *In re Church Street*, 49 Barb. 455; *Leroy v. Mayor, etc.*, 4 Johns. Ch. 352; *T., etc., R. R. Co. v. Cane*, 9 Hun, 508; *Genet v. City of Brooklyn*, 99 N. Y. 306; *Kennedy v. City of Troy*, 77 id. 493; *Spencer v. Merchant*, 100 id. 585; *Lyon v. City of Brooklyn*, 28 Barb. 609; *Bouton v. President, etc.*, 2 Wend. 395-398; *Hasson v. City of Rochester*, 67 N. Y. 536; *In re Broadway*, 63 Barb. 575; *Osterhout v. Hyland*, 27 Hun, 170; *Strasburg v. Mayor*, 13 J. & S. 508; *In re Ferris*, 10 N. Y. S. R. 480; Cooley on Taxn. [2d ed.] 748, 775.) The special findings of facts made by the learned court at the request of the plaintiff to the effect that the assessment upon his lands is excessive, do not call for a reversal of the judgment appealed from. (*In re Kruger*, 84 N. Y. 621; *Dickson v. Racine*, 65 Wis. 306; *Chamberlain v. Cleveland*, 34 Ohio, 567; *People ex rel. v. Mayor, etc.*, 63 N. Y. 299; Laws of 1887, chap. 547, § 1; *In re S. I. R. T. Co.*, 47 Hun, 396; Laws of 1870, chap. 519; *People ex rel. v. Common Council*, 78 N. Y. 33.) The finding of the court that the market value of the premises assessed was several thousand dollars greater than the amount assessed thereon is sustained by the evidence and the exception to such finding is not well taken. (*In re Broadway*, 63 Barb. 572; *Genet v. City of Brooklyn*, 99 N. Y. 308.) The court having found that the land assessed, exclusive of the improvement thereon, was worth more than the amount assessed against the same, and that its value, with the improvements, was many thousand

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dollars in excess of the assessment, there can be no question of confiscation here. (*Lyon v. City of Brooklyn*, 28 Barb. 609; *In re Mead*, 74 N. Y. 216-219; *In re Church St.*, 92 id. 1-6; *Genet v. City of Brooklyn*, 99 id. 306; *In re Sackett St.*, 4 Hun, 98; 74 N. Y. 95; *Soady v. Wilson*, 3 Ad. & El. 252; *Pearson v. Zabel*, 78 Ky. 170-173; *City of Ludlow v. Trustees, etc.*, Id. 337-360; *McFerran v. Alloway*, 14 Bush. 580; *Dickson v. City of Racine*, 65 Wis. 306; *Watson v. Chicago*, 115 Ill. 78.) The fact that the assessors in finally fixing the amount to be assessed upon each parcel of land, fixed the same without regard to the value of the buildings and other improvements upon the same, for the reason that they determined the amount of benefits was not affected by the improvements, does not invalidate the assessment. (*O'Reilly v. City of Kingston*, 114 N. Y. 440.) The defendant's charter makes an assessment for benefits a charge against an award made the same owner for lands taken, and the city has the legal right to offset the award against the assessment, and is only required to pay the balance over and above such assessment for benefits. (*Genet v. City of Brooklyn*, 99 N. Y. 306; *In re Center St.*, 115 Penn. St. 247; *City of Galesburg v. Searles*, 114 Ill. 219.)

BRADLEY, J. By this action in equity the plaintiff sought to have it adjudged that an assessment made upon his land in the city of Buffalo was void, and for that reason to restrain its collection and stay a pending proceeding to set it off against a sum awarded to him by the city for his property there appropriated for a street.

In proceedings had for that purpose, pursuant to the statute, lands were taken for the extension of Lord street from Seneca street to Seymour street, awards were made to the owners of the lands so taken, and the common council of the city fixed the amount to be raised to pay for the improvement at \$22,440.70, and directed the board of assessors to assess it upon the lands to be benefited by the improvement in proportion to such benefit. The board of assessors thereupon made

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up an assessment-roll assessing certain lands, in the aggregate, the amount so fixed, for the purpose of paying the cost and expense of the improvement. The plaintiff's land was assessed \$14,775.78. He complains of this and asserts: (1) That his land was not proportionately assessed; (2) That it was assessed beyond the benefit received by it, and (3) That the assessment amounted to a substantial confiscation of his property without compensation. The proceedings taken by the common council with a view to the assessment, and those of the board of assessors in making it, were apparently regular, and it must be assumed they were so in fact, unless the contrary was made to appear. (L. 1870, ch. 519, tit. 7, § 36.)

Upon the subject of local assessments the defendant's charter provided that the common council should estimate and fix the amount; that the assessments be made by the board of assessors; and that they should assess the whole amount upon the parcels of land benefited by the improvement in proportion to such benefit. (Id. tit. 6, §§ 1, 2, 3.) It is not claimed that any land outside the district upon which the assessment was made should have been included in it as benefited by the work. Nor is any fraud on their part in making it alleged. The plaintiff's case rests mainly upon the alleged fact that the assessment on his land was largely in excess of its proportionate benefit derived from the improvement. Evidence was given tending to prove the fact, and the trial court so found, and further, that the assessment upon the plaintiff's land was largely in excess of the benefit derived by it from the work; and that the assessment was not made upon the parcels of land benefited in proportion to such benefit. While it may be that relief upon that state of facts may have been given upon a direct review by certiorari of the assessment, it is difficult to see how they can furnish any support for collateral attack of it by action. The statute seems to have devolved upon the assessors of the defendant the duty and power of determining the district benefited by a local improvement and of making the proportional assessment upon the respective parcels of land. Those matters are left to the judgment of the board of

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assessors; and "it shall be presumed that every * * * assessment made * * * is valid and regular, and that all the steps and proceedings required by law were taken and had until the contrary shall be made to appear." (Id. tit. 7, § 36.)

This, upon the evidence and findings, was a case of over assessment on the plaintiff's land. If this was the result of mere error in judgment of the assessors, it is not the subject of what was formerly known as a bill of review; and like the determination by any tribunal of matters brought within its jurisdiction their judgment is not the subject of review by action collaterally. It is urged that in view of the large excess in the amount of the assessment upon the plaintiff's land over its due proportion, it must be assumed that the assessors proceeded on some erroneous principle or rule in making it. If the evidence would have justified the inference to that effect in the court below, it did not as matter of law require such conclusion; and, therefore, the question is not here for consideration. While the excess may be so greatly out of proportion as to permit the inference of corrupt purpose or of adoption of an erroneous rule of estimate, the matter of excess is one of degree only; and if in one case an assessment having the support of jurisdiction of the assessors and of presumption of regularity, may upon the evidence of witnesses to the effect that it was disproportionately made upon the lands, be vacated in a collateral action, the question would be an open one in every case where some one or more of the persons whose lands are subjected to assessment deem themselves aggrieved for such cause. It is for the legislature to provide such means for direct review of the discretionary or judicial power of municipal officers in making assessments and levying taxes as may be deemed essential to the protection of the rights of the property owner. The rule is fundamental that equality in the imposition of the burden of taxation is of the very essence of the right, and consequently the failure to observe that principle in a statute providing for assessments and their apportionment as applied to the property benefited would render it invalid.

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While this perfection must be in the law under which the assessors proceed, the execution of it dependent upon their judgment may not be free from criticism although made in good faith.

It is, however, urged that the assessment was made upon a wrong principle and is for that reason illegal. This is founded upon the concession at the trial and the finding accordingly "that the assessors in finally determining the amount to be assessed for the benefits upon each of the pieces of land assessed, fixed those amounts without regard to the value of the buildings or other improvements upon the respective parcels for the reason that they determined that the amount of benefits was not affected by the improvements." It appeared that upon the plaintiff's land and some other of the lands assessed there were buildings and that other lots within the assessment were vacant. The assessors did not fail to consider the improvements on the lands, and having determined that the amount of benefits was not affected by them, assessed it upon the lots respectively without regard to the value of the buildings. This was not in violation of the rule embraced within the reason given in *Kennedy v. City of Troy* (77 N. Y. 493), for decision in *Clark v. Village of Dunkirk* (12 Hun, 182; 75 N. Y. 612). And was in harmony with the views of the court upon which *O'Reilley v. City of Kingston* (114 N. Y. 439) was determined. The facts so found do not show that the assessors proceeded on a wrong rule of law in making their estimate of the benefits to the lands assessed.

The assessment does not, therefore, seem to have been illegal in the sense requisite to the support of an action for relief against it. In a case for such relief the proceedings are regular and on their face valid, but by reason of something extrinsic the record they are illegal. In that case relief may be had in equity. (*Strusburgh v. Mayor, etc.*, 87 N. Y. 452.) So far as appears in the present case the cause of the plaintiff's complaint may have been the result of mere error in judgment of the assessors. And although the assessment was not illegal it may have been erroneous. In that view it is not

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important whether or not chapter 358 of the Laws of 1865, remains in force, as the actions there referred to had relation to illegal assessments. It cannot here be seen what may have been the result in the court below if fraud or corrupt purpose on the part of the assessors in making the assessment had been alleged in the complaint, as in such case it may be that inference to that effect may have been permitted by the evidence.

Although we find no support for the action, the facts so tend to show the assessment erroneous to the prejudice of the plaintiff that the denial of costs is justified.

The judgment should be affirmed.

All concur.

Judgment affirmed. _____

WILLIAM T. PECK, Appellant, v. GEORGE BELKNAP,
Impleaded, etc., Respondent.

A disqualification, under the Civil Service Law, for an appointment in the public service of a city, applies not only to the individual who has not passed the requisite examination, but also to the city itself; it cannot employ, or receive into its service, a person not eligible under the law. An action is maintainable, at the suit of a taxpayer, against city officials, restraining them from entering into a contract of employment, in a position where a civil service examination is required, with one who has not passed the examination, or to restrain the payment of the salary of such an employe out of the funds of the city. (Code Civ. Pro. § 1925; chap. 673, Laws of 1887.)

It is not a defense to such an action that an employment by the city of some person for the purpose specified is proper and lawful, and that the compensation agreed to be paid was not extravagant.

Where an appointment is to a position covered by the regulations for admission into the service of the city by its mayor, and approved by the civil service commission, the relation to the city of the appointee cannot be changed into that of an independent contractor by the execution of a formal contract between them, setting forth the specific duties he is to perform.

The common council of the city of Rochester, by resolution, authorized the employment of some person to keep a book containing a record of the street lamps in the city, and showing the number each day not lighted as reported to him by the policemen of that city. B. was so

180 394
148 367

180 394
j 152 368
j 152 388

180 394
158 362
158 519

180 394
171 3615

130 394
77 AD 502

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employed for a period stated, at a specified salary, and he entered upon the discharge of his duties. The common council, by another resolution, directed the mayor to enter into a contract with B. for the performance by him, at a compensation stated, of the duties specified in the prior resolution, and in addition "to perform such other duties as may be connected with the public street lighting system of the city as may be required" and to furnish "written reports upon any of the subjects aforesaid." The regulations for the admission of persons into the service of the city, after certain exceptions, classified the service as follows: "Schedule B (Part one). All officers and members of the Police and Fire Department. (Part two). All other subordinate officers and assistants." Appointments in part two were required to be made from persons whose names were certified by the board of examiners. B. had never been examined, nor was his name certified by that board. *Held*, that B., under both resolutions, was an assistant to the lamp committee, with duties merely clerical, and so, his employment fell within part two, and his admission into the city service was illegal; that any payments made to him by the city officials would be a waste of the city funds, and, therefore, that an action was maintainable, at the suit of a taxpayer, to restrain such payment.

Peck v. Belknap (55 Hun, 91), reversed.

(Argued December 10 1891; decided January 20, 1892.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 1, 1889, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

John H. Hopkins for appellant. The plaintiff, as a taxpayer of the city of Rochester, was entitled to the relief prayed for. (*Osterhoudt v. Rigney*, 98 N. Y. 222; *Talcott v. City of Buffalo*, 34 N. Y. S. R. 873, 874, 875; *People ex rel. v. Village of Little Falls*, 8 N. Y. Supp. 512; Laws of 1887, chap. 673; *Ayers v. Lawrence*, 59 N. Y. 192; Code Civ. Pro. § 1225; *Rogers v. City of Buffalo*, 123 N. Y. 173; 22 Abb. [N. C.] 144; 2 N. Y. Supp. 326.) The resolution of the common council clearly contemplated the employment of the defendant Belknap as a subordinate officer, clerk or assistant in the civil service of the city of Rochester; and he was not

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eligible to such employment until he had passed the requisite examination. (Laws of 1883, chap. 354, § 8; Laws of 1884, chap. 410, § 2; *Rogers v. City of Buffalo*, 123 N. Y. 173; *Aiken v. Wasson*, 24 id. 482; *Coffin v. Reynolds*, 37 id. 640; *Wakefield v. Fargo*, 90 id. 213.)

Henry J. Sullivan for respondent. The employment of the defendant Belknap, even if it were one under the terms of the resolution of December 20, 1887, was not a violation of any of the provisions of the Civil Service Act. (Laws of 1883, chap. 354, § 7; Laws of 1884, chap. 410, § 2; *People ex rel. v. Lacombe*, 99 N. Y. 49.) The entering into the contract provided for in the resolution of December 20, 1887, by the mayor and city with Mr. Belknap, was not in violation of the so-called Taxpayers' Act. (*Talcott v. City of Buffalo*, 125 N. Y. 280.) This action will not lie, for the reason that it is not brought to protect any interest of the plaintiff, as a taxpayer. (*Hull v. Ely*, 2 Abb. [N. C.] 440; *Kemball v. Hewitt*, 3 N. Y. Supp. 756; 22 N. Y. S. R. 311.) The contract provided for in the resolution of December 20, 1887, was one which could have been performed by means of agents, as well as personally, or, in other words, it constituted the defendant Belknap an independent contractor. (*Schenck v. Mayor, etc.*, 10 Hun, 124; *Osterhoudt v. Rigney*, 98 N. Y. 222.)

BROWN, J. This action was brought by the plaintiff as a taxpayer of the city of Rochester to procure a judgment restraining the mayor of said city from entering into a contract of employment with the defendant Belknap on behalf of the city, whereby said Belknap was to render during a designated period certain services relating to street lights particularly set forth and enumerated in a resolution of the common council, and to restrain the city clerk and treasurer from drawing upon or paying out to said Belknap from the funds of the city any money under said resolution.

The ground upon which this judgment was sought was that Belknap had not passed the examination which, under the Civil Service Law of the state and the regulations prescribed

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by the mayor, it was essential he should pass before entering into the public service of the city.

It appeared that about November 1, 1887, the common council of the city had, by resolution, authorized the employment by the lamp committee of some person to whom the policemen of the city were to be required to report the number of street lamps unlighted, and who should keep a book which should contain a record by streets of the gas and electric lamps of the city, and their location, and which should each day show the number not burning; and pursuant to this resolution, on or about November fifteenth, said Belknap had been employed by the lamp committee until April 1, 1888, at a salary of seventy dollars per month, and on November nineteenth he entered upon the discharge of his duties, and the court found as a fact that he continued to discharge them until the end of the term designated. On December 20, 1887, the common council passed another resolution which directed the mayor to enter into a contract with said Belknap to perform until April 1, 1888, the duties specified in the resolution before referred to, and in addition to keeping a record of the unlighted street lamps, he was "to perform such other duties as may be connected with the public street lighting system of the city * * * as may be required by said committee or this common council, and to furnish to said committee and the common council written reports upon any of the subjects aforesaid," and for which he was to receive as compensation the sum of \$313.33 in three equal payments on the first days of February, March and April.

This resolution was vetoed by the mayor on the ground that it was in contravention of the Civil Service Law of the state, but was subsequently repassed over the veto by the common council by a two-thirds vote.

It further appeared that the regulations for the admission of persons into the service of the city prescribed by the mayor and approved by the civil service commission applied to all positions in the public service, except to "elective officers, subordinates of the city treasurer, and persons employed by or who

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seek to enter in the service under the board of education." That, with that exception, the service was classified as follows: "Schedule B. (part one). All officers and members of the police and fire department." (Part two). "All other subordinate officers and assistants." Schedule D. "All persons employed as laborers or day workmen."

For appointments under Schedule D no examination was required. Applicants for appointment under Schedule B were to be examined as provided in the regulations, and appointments to any positions in part two were to be made from persons whose names were certified by the board of examiners.

It was not disputed that Belknap's name had not been certified by the board of examiners, nor that he had never been examined.

The Special Term decided that the employment of Belknap by the lamp committee under the resolution of November first, and the contract directed to be entered into by the mayor by the resolution of December 20, 1887, were both illegal, and that the payment of any funds of the city as directed by said resolution would constitute waste or injury to such funds within the meaning of chap. 673, Laws of 1887, and gave judgment in accordance with the prayer of the complaint. The General Term reversed the judgment and dismissed the complaint on the grounds, first, that the contract directed to be entered into was not an illegal one, and second, that Belknap was not a subordinate officer, clerk or assistant of the city, but was an independent contractor, and hence not within the terms of the Civil Service Law.

An action against the officers of a municipal corporation to prevent any illegal official act on their part, or to prevent waste or injury to any property or funds of such corporation is expressly authorized by the legislature in the several acts for the protection of taxpayers. (Code Civ. Pro. § 1925; Chap. 673, Laws of 1887.)

These acts have very recently received judicial construction in this court (*Talcott v. City of Buffalo*, 125 N. Y. 280; *Ziegler v. Chapin*, 126 id. 342), and whatever difference of opinion existed in those cases with reference to the scope of

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the laws, the power of the court to interfere on the suit of a taxpayer and restrain illegal official action was not questioned or denied.

The conclusion of the General Term that the employment of Belknap was not an illegal act appears to have been founded upon a consideration of the provisions of the charter of the city, and the power there conferred upon the common council "to provide for and regulate the lighting of the streets and the protection of the public lamps," and the argument was that as the employment of some person for the purpose specified was proper and lawful, and the compensation was not extravagant, the pecuniary result to the taxpayer was the same whether the employe passed the civil service examination or not, and there was no waste of or injury to the public funds. This construction overlooks the illegal character of the official act contemplated, ignores the Civil Service Law and justifies its violation.

That it cannot prevail is too plain to need argument to controvert it. Precisely the same question was presented and overruled in the case of *Rogers v. Common Council of Buffalo* (123 N. Y. 173) and while not argued by counsel in this court, was raised by the findings and exceptions and involved in the decision.

That cannot be legal which is forbidden by law, and in respect to the legality of a contract no distinction is apparent between one, the subject matter of which is not within the power of the common council, and one within its power but attempted to be made with a person with whom the common council is forbidden by law to contract. The disqualification under the Civil Service Law applies not only to the individual who has not passed the requisite examination, but also to the city itself. It cannot employ or receive into its service a person not eligible under the law.

Section 8 of the act as amended by chapter 410 of the Laws of 1884 provides that after the termination of three months from the passage of that act "no officer or clerk shall be appointed and no person shall be admitted to or be promoted

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in either of said classes" (in the public service of the city) "until he has passed an examination or is shown to be exempted from such examination in conformity with such regulation," and in the presence of that plain provision of the statute it is idle to argue the question of the power of the common council to employ as a clerk or subordinate officer one who has not passed the examination required by the regulations prescribed by the mayor of the city.

The second ground adopted by the General Term is equally untenable. A formal contract between Belknap and the mayor in which should be set forth the specific duties he was to perform, as they were enumerated with much detail in the resolution of December twentieth, could not change his relation to the city or transform an ordinary clerk into an independent contractor.

At the time of the adoption of that resolution he had been rendering service to the city for more than a month under an employment by the lamp committee, pursuant to the resolution of November first, heretofore referred to, and his contract was to be for the same service and at the same wages as specified in the resolution of December twentieth, and was to cover the past services and the back pay.

He was under both resolutions an assistant to the lamp committee, and his duties were wholly clerical. His employment fell within part two of Schedule B of the mayor's regulations, and neither the common council nor the mayor had any power to employ him unless his name was certified by the board of examiners.

His admission into the service of the city was plainly illegal and the attempted contract created no legal liability on the part of the city, and any payments made to him by the city officers under that employment would have been a waste of the city's funds.

The order of the General Term should be reversed and the judgment of the Special Term affirmed.

All concur.

Order reversed and judgment affirmed.

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SYLVESTER TRIMMER, Appellant, v. THE CITY OF ROCHESTER,
Respondent.

130	401
134	76

Where money has been collected under an assessment for a local improvement which is valid on the face of the record but is illegal by reason of the existence of some fact outside thereof, it may not be recovered back until the assessment is set aside.

It is not sufficient that in an action brought by another party whose property was assessed for the same improvement a judgment was recovered adjudging the assessment against his property to be illegal and void; this does not set aside all of the assessments, but only that against the property of the plaintiff in such action, and the other assessments are not affected or invalidated thereby.

(Argued December 10, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought to recover back moneys paid upon alleged illegal assessments for a street improvement.

May 30, 1865, the common council of the city of Rochester, pursuant to chapter 143 of the Laws of 1861, the city charter, confirmed an assessment of \$30,830, for curbing and paving Oak street, between Allen and Lisle streets, the sum being assessed upon property benefited by the improvement. One-third of the assessment became due August 30, 1865, one-third, May 30, 1866, and one-third, May 30, 1867. The last two installments bore interest at the rate of seven per cent from May 30, 1865. Among other property assessed was a lot belonging to Thomas Brady upon which there was levied \$492, one-third of which, \$164, was payable August 30, 1865, one-third, May 30, 1866, with interest from May 30, 1865, and one-third, May 30, 1867, with interest from May 30, 1865. August 30, 1865, Brady paid \$164, and April 19, 1866, \$174.15, the amount of the second installment with interest. Prior to February 21, 1888, Brady's right to recover

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the sums so paid by him was assigned to this plaintiff, who on the date mentioned demanded payment of the defendant of the sums and February 23, 1888, brought this action to recover the amounts paid with interest from the dates of payment.

July 18, 1867, William E. Hasson and others, Thomas Brady not being a party, brought an action to set aside the assessment against their properties upon the ground that certain realty benefited by the improvement had been omitted from the roll. September 9, 1882, a judgment was recovered in the action, adjudging that the assessments against the realty of the plaintiffs in that action were illegal and void by reason of such omission, and the city and its officials were restrained from collecting the assessments from the plaintiffs or out of their property. (6 Lans. 185; 65 N. Y. 516; 67 id. 528.)

Further facts are stated in the opinion.

D. Clinton Barnum for appellant. Money paid on an illegal assessment may be recovered back. (*Bank v. Mayor, etc.*, 43 N. Y. 184; *Peyser v. Mayor, etc.*, 70 id. 497; *Strusburg v. Mayor, etc.*, 87 id. 452; *Chapman v. City of Brooklyn*, 40 id. 380, 381; *Newman v. Suprs., etc.*, 45 id. 687; *Horn v. Town of New Lots*, 83 id. 100-107; *Parsons v. City of Rochester*, 43 Hun, 259; *Brehm v. Mayor, etc.*, 39 id. 533.) The payment of the assessment was under coercion of law, and, therefore, not voluntary. (*Hasson v. City of Rochester*, 67 N. Y. 536; *Parsons v. City of Rochester*, 43 Hun, 259; *Guest v. City of Brooklyn*, 69 N. Y. 506; *Hatch v. City of Buffalo*, 38 id. 276; *Haywood v. City of Buffalo*, 14 id. 534; *Scott v. Onderdonk*, Id. 9; *Bank of Commonwealth v. Mayor, etc.*, 43 id. 188; *Peyser v. Mayor*, 70 id. 497; *Breucher v. Vil. of Port Chester*, 101 id. 244; *Lott v. Swezey*, 29 Barb. 87; *Scholey v. Halsey*, 72 N. Y. 582; *Bank of U. S. v. Bank of Washington*, 6 Pet. 8; *Howard v. City of Augusta*, 74 Me. 79; *Pooley v. City of Buffalo*, 122 N. Y. 602; *Flower v. Lance*, 59 id. 610; *Mobile v. Stiner*, 61 Ala. 595.) It need not affirmatively appear that the party paying the assessment did not know of

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the defects where the payment was under coercion of law. (*Peyser v. Mayor, etc.*, 70 N. Y. 497; *Lott v. Swezey*, 29 Barb. 94; *People v. Carter*, 119 N. Y. 560.) Even if the payment was with full knowledge, it was not voluntary, because made under coercion of law. Compulsory payments are not rendered voluntary because of knowledge of the facts. (*Peyser v. Mayor, etc.*, 70 N. Y. 497; *Breucher v. Vil. of Port Chester*, 101 id. 240; *Chase v. Devinal*, 7 Me. 138; *Tripler v. Mayor, etc.*, 125 N. Y. 627.) But even if the payment was with knowledge, and if knowledge does render a compulsory payment voluntary, plaintiff may recover, because the assessment was vacated after the payment and before suit. (*Lott v. Swezey*, 29 Barb. 94; *Peyser v. Mayor, etc.*, 70 N. Y. 501.) The action is not barred by the Statute of Limitations. The assessment being valid on its face, it was a protection to defendant until reversed, and no action could be brought for money paid under it until it was reversed. (*Brehm v. Mayor, etc.*, 104 N. Y. 186; *Bank v. Mayor, etc.*, 43 id. 184; *Strusburg v. Mayor, etc.*, 87 id. 455; *Breucher v. Vil. of Port Chester*, 101 id. 244; *Brundage v. Vil. of Port Chester*, 102 id. 497; *Newman v. Suprs.*, 45 id. 688; *Horn v. Town of New Lots*, 83 id. 100; *Sherman v. Clifton Springs*, 27 Hun, 390; *Fisher v. Langbein*, 103 N. Y. 84, 90; *Day v. Bach*, 87 id. 61; *Marks v. Townsend*, 97 id. 600; Code Civ. Pro. §§ 380, 415; *O'Hara v. State*, 112 N. Y. 155; *Parker v. Stroud*, 98 id. 383; Wood on Lim. 335, § 160; *Collins v. Thayer*, 71 Ill. 138; *C. R. R. Co. v. Parks*, 33 Ark. 131; *Peyser v. Mayor*, 70 N. Y. 502; *Bruce v. Tilson*, 25 id. 196; *Peters v. Delaplaine*, 49 id. 388; *Tapley v. McPike*, 50 Mo. 589; *Bank of U. S. v. Bank of Washington*, 6 Pet. 18; *Dowell v. Webber*, 2 S. & M. 452; *Abbott v. McElroy*, 10 id. 100; *Lawton v. Bowman*, 2 Strob. 190; *Moser v. Jones*, 2 M. & McC. 259; *Tarver v. Cowart*, 5 Ga. 66; Angell on Lim. §§ 63, 99; *Bank v. Townsend*, 87 N. Y. 10; *Osburn v. Rogers*, 112 id. 573; *Pickard v. Valentine*, 13 Me. 412.) The judgment is appealable to this court. (*Josnez v. Connor*, 75 N. Y. 156.) The fact that the plaintiff's

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assignor is intestate and was not a party to the action to set aside the assessment, does not defeat a recovery. (*In re DeLancey*, 52 N. Y. 82.)

Henry J. Sullivan for respondent. The payments sought to be recovered back in these actions were voluntary ones, not coerced in any manner by duress of person, goods, or otherwise, and the amounts thus paid cannot be recovered back. (*Tripler v. Mayor, etc.*, 125 N. Y. 617, 630; *Vanderbeck v. City of Rochester*, 122 id. 285; *Pooley v. City of Buffalo*, Id. 592; *Phelps v. Mayor, etc.*, 112 id. 222; *Forest v. Mayor, etc.*, 13 Abb. Pr. [N. S.] 350, 353; *Cutler v. Mayor, etc.*, 92 N. Y. 170.) The parties making the payments could have maintained actions, provided said payments were involuntary ones, without having the assessment set aside or vacated for the reason that it was void, owing to the assessors omitting, in making the assessment, to include said 900 feet or thereabouts, frontage of state lands on Oak street, contrary to the provisions of the ordinance, and for that reason said assessors lost jurisdiction. (*Breucher v. Vil. of Port Chester*, 101 N. Y. 240, 244; *Jex v. Mayor, etc.*, 103 id. 536, 541; 111 id. 339, 342; *Diefenthaler v. Mayor, etc.*, Id. 331, 339.) The action is one brought to recover for money alleged to have been had and received by the defendant for the use of the owners paying the same. (*Horn v. New Lots*, 83 N. Y. 101.) The payments were made more than twenty years before the commencement of this action, and, therefore, the Statute of Limitations bars a recovery being had therefor for that reason. (*Diefenthaler v. Mayor, etc.*, 111 N. Y. 331, 337, 338; *Jex v. Mayor, etc.*, Id. 339, 342; *Brundage v. Vil. of Port Chester*, 31 Hun, 130, 131; *Parsons v. City of Rochester*, 43 id. 258, 260; *Clowes v. Mayor, etc.*, 47 id. 539, 540.)

FOLLETT, Ch. J. The taxing officers of the defendant omitted from the assessment-roll realty benefited by the improvement, and for this error assessments against the taxpayers who brought actions to set them aside were adjudged

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to be illegal. (*Hassen v. City of Rochester*, 65 N. Y. 516; 67 id. 528.)

There is a broad distinction between an assessment which is illegal by reason of the existence of some fact outside of the record, and one void on the face of the record, for lack of jurisdiction of the person or property, or by reason of the unconstitutionality of the statute under which the assessment is made. In the latter case, if money is compulsively obtained it may be recovered from the municipality in an action at law brought by the wronged taxpayer. But in case money is collected under an illegal assessment, it cannot be recovered until the assessment is set aside. (*Horn v. Town of New Lots*, 83 N. Y. 101; *Purssell v. Mayor, etc.*, 85 id. 330; *Strusburgh v. Mayor, etc.*, 87 id. 452; *Bruecher v. Village Port Chester*, 101 id. 240; *Jex v. Mayor, etc.*, 103 id. 536.)

The rights of persons from whom money is collected under such assessments are like those of persons from whom money is collected under judgments void; for example, for lack of jurisdiction, and those which are reversible for error. Money collected under void judgments may be recovered without first setting them aside, but that collected under judgments erroneously obtained cannot be until they are reversed.

It is agreed that the assessment against the realty of the assignor of the plaintiff, and on account of which the money sought to be recovered in this action was paid has not been set aside, nor have any proceeding or actions been instituted for such purpose.

The judgment in *Hassens* case did not set aside all of the assessments but only those against the property of the plaintiffs in that action, and the assessment against realty of the assignor of the plaintiff was not affected or invalidated by that judgment, and until it is set aside no action can be maintained to recover the sums paid under it. (*Matter of Delancey*, 52 N. Y. 80; *Wilkes v. Mayor*, 79 id. 621; *Purssell v. Mayor, etc.*, 85 id. 330; *Chase v. Chase*, 95 id. 373.)

The foregoing cases arose under special statutes regulating the remedies of taxpayers in cases of illegal assessments in the

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city of New York. (C. 338, L. 1858; C. 312, L. 1874; C. 550, L. 1880.)

But *Moore v. City of Albany* (98 N. Y. 396) did not arise under a statute affording aggrieved taxpayers special remedies, and it was there held that in case all the assessments on the roll were illegal for a common cause, not appearing on the face of the roll, or on the record on which it rested, a judgment vacating an assessment in favor of one taxpayer did not vacate the assessments against the others. (*Reid v. Bd. Super. Albany Co.*, 128 N. Y. 364.)

The result is that the plaintiff failed to establish a cause of action for the recovery of the money paid, and the complaint was rightfully dismissed. These views render it unnecessary to consider the question of the effect of the Statute of Limitations.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

RUSSELL W. OSTRANDER, Appellant, v. JOSEPH HART,
Executor, etc., et al., Respondents.

130	406
132	563

A judgment against a plaintiff in favor of one defendant determines nothing between the latter and a co-defendant.

While a judgment may determine the ultimate rights of defendants, as between themselves, where their interests in the subject-matter of the action are conflicting, such a determination may not be required or rendered in favor of one of the defendants, unless he has not only demanded it in his answer, but has served a copy thereof upon the attorney of each defendant to be affected by the determination, appearing in the action and personally upon each defendant so affected who has not appeared. (Code Civ. Pro. § 521.)

In an action of ejectment, plaintiff claimed title under a deed from an assignee in bankruptcy of H., a former owner of the premises. Defendant P. claimed title under a sale on foreclosure of a mortgage executed by H. before the institution of the bankruptcy proceedings. It was claimed by plaintiff that, at the time of the foreclosure, the mortgage was paid. It appeared that S., the mortgagee, brought an action to set aside the foreclosure proceedings and sale, to which action H., individually and as executor and trustee of his wife, who bid off the prem-

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ises on the sale, and his assignee in bankruptcy were made parties; the assignee did not answer; H. answered, alleging that the premises were struck off to his wife in pursuance of an agreement between her and S. No copy of this answer was served on the assignee. On trial of that action, the court found that Mrs. H. advanced moneys and acquired rights under the sale which her estate was entitled to hold, although the claim secured by the mortgage was paid, and a decree was entered to the effect that the foreclosure was valid, and that S. was not entitled to have the same vacated. The trial court here decided that said judgment was a bar to this action; that the assignee, being a party, was bound by the decision; and so that he had no title and could convey none to plaintiff. *Held*, error; that the judgment was neither conclusive as a bar nor as evidence against plaintiff, because no demand was made in the pleadings which called upon the assignee to defend his title as against H., and no adjudication was made between him and any party to the action.

An omission to find facts claimed by the unsuccessful party to a suit to be warranted by the evidence, can only be taken advantage of by an exception to a refusal to so find, upon request duly made as required by the Code of Civil Procedure (§§ 993, 1023).

It appeared that defendants were in lawful possession as purchasers under the foreclosure sale. Plaintiff claimed that said mortgage was paid before the sale, and evidence was given from which the trial court could have so found. It did not so find, and no request was made by plaintiff for a finding upon the subject. The court found that H. had been divested of his interest by the foreclosure of said mortgage, and dismissed the complaint. *Held*, no error; that this court cannot look into the evidence for facts to reverse the judgment.

(Argued December 10, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 11, 1890, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial without a jury.

This was an action of ejectment brought to recover the possession of eight lots of land situate in the village of West Flushing, county of Queens, of the value of \$2,000.

The defendant Joseph Hart, individually, owned the premises in question on the 6th of July, 1878, when he filed a petition in bankruptcy and included said lands in his schedule of assets. On the ninth of August following, said Hart was duly adjudged

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a bankrupt and on the 11th of April, 1879, one Louis F. Post was appointed assignee of his estate. The premises in question were conveyed to the assignee by the register in bankruptcy on or about April 17, 1879. On the 23d of April, 1887, by due course of procedure in bankruptcy, the interest of Hart in said premises at the time when his petition was filed, was sold to the plaintiff by said assignee for the sum of fifty dollars.

August 17, 1876, said Hart, who then owned the premises and Sarah Hart, his wife, executed and delivered to one Sanders a mortgage thereon, collateral to a bond of even date, to secure the payment of \$7,000. Said mortgage was subsequently foreclosed by advertisement under the statute in behalf of said Sanders, the date of the first publication of the notice of sale being March 27, 1879, and on the 20th of June, 1879, said premises were sold thereunder to Sarah Hart, who afterward died in possession of the same, leaving a will by which Joseph Hart was made trustee for the benefit of her children and authorized to sell her real estate. Under this will Joseph Hart as trustee, on the 16th of February, 1886, sold the lands in question to the defendant Prince, who through his tenants, was in possession of the same when this action was commenced.

In February, 1885, said Sanders commenced an action in the Supreme Court against Joseph Hart, individually and as executor and trustee under the last will and testament of Sarah Hart, deceased, Louis F. Post, as assignee in bankruptcy of Joseph Hart, and others, and demanded, as the relief to which he deemed himself entitled, that the affidavits made and recorded in said foreclosure proceedings should be adjudged void and canceled of record; that all the rights of the defendants in said premises should be foreclosed and the premises sold to pay said mortgage. He based his claim to this relief upon the allegation that at the time of said statutory foreclosure he believed he had money enough in his possession belonging to said Joseph Hart to pay said mortgage, which he foreclosed at Hart's request for Mrs. Hart's benefit, so that she could bid in the premises, but that he was afterwards compelled by a judicial proceeding to which neither Hart nor his wife was a

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party, to apply said money in another direction. Said Louis F. Post, as assignee, did not answer, or appear in said action, although the summons and complaint were personally served upon him. Joseph Hart, both individually and as trustee, served an answer in which he alleged that Sanders duly agreed with Sarah Hart to convey the mortgaged premises to her without charge, or to have the same struck off to her at the sale under the foreclosure proceedings then pending. He made no demand for relief against any co-defendant, but simply asked that the complaint be dismissed with costs. No copy of the answer was served on Post.

Upon the trial of that action the court found that on the faith of the agreement between Sanders and Mrs. Hart she advanced moneys to her husband and that she acquired rights under the sale that her estate was entitled to hold, although the claim secured by the mortgage was paid. A decree was entered against the plaintiff Sanders, in favor of Hart, as trustee, etc., and of his children, who appeared by guardian *ad litem*, "that the foreclosure proceedings set up in the complaint were regular and valid and the plaintiff is not entitled to have the same vacated or set aside; that the title to the mortgaged premises was duly and regularly vested in Sarah Hart during her life-time and that the defendants aforesaid have judgment herein upon the merits against the plaintiff." The remainder of the judgment was for costs in favor of Hart and his children against said Sanders as plaintiff. No other relief was granted in favor of or against any party to the action.

The trial court, after finding the foregoing facts in substance, found as conclusions of law that said decree was a bar to this action; that Sarah Hart acquired a good title to the premises and that it is now vested in the defendant Prince; that the sale by Post, as assignee, conveyed no title to the plaintiff, as Joseph Hart had been divested of his interest by the foreclosure of the prior mortgage, and directed that the complaint be dismissed, with costs.

Further facts are stated in the opinion.

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E. Countryman for appellant. Louis F. Post, the assignee in bankruptcy, became vested with the title to the real estate in question on the 6th day of July, 1878, the day Hart filed his petition to be declared a bankrupt, subject to the mortgage thereon previously made to Sanders, dated August 17, 1876, so far as it remained unpaid. (Bump on Bank. [5th ed.] 321, 323; Blumenstiel on Bank. 180, 181, 182.) The mortgage having become extinct by payment, it could not thereafter be the basis of title to the premises through a sham foreclosure sale as under the mortgage. (Bump on Bank. [5th ed.] 114, 325; Blumenstiel on Bank. 181, 327; *Davis v. Anderson*, 5 Nat. Bank. Reg. 145; *In re Neale*, 3 id. 177.) The mortgage having been once paid, it could not be revived and made effectual for new liabilities incurred by the mortgagor. (*Mead v. York*, 6 N. Y. 449; *Merrick v. Bartholick*, 36 id. 461; *Wanzer v. Cary*, 76 id. 526; *Shattuck v. Bascom*, 105 id. 43.) The assignee in bankruptcy having become vested with the absolute title to the property, and that, too, discharged of the mortgage to Sanders, neither the bankrupt Hart nor his mortgagee Sanders could afterwards divest him of that title through any process based upon that extinct mortgage. (Blumenstiel on Bank. 181; *In re Anderson*, 9 Bank. Reg. 360; *Mead v. York*, 6 N. Y. 449, 452; *Cameron v. Irwin*, 5 Hill, 272.) There has never been any litigation or adjudication between the parties herein or their privies. There is, therefore, no judgment which can operate as a bar to this action. (Code Civ. Pro. § 521.) In the action of *Sanders v. Hart*, the court could have no jurisdiction over the assignee in bankruptcy or the property vested in him. They both had previously been brought within the exclusive jurisdiction of the United States District Court in bankruptcy. That court is invested with such jurisdiction over the bankrupt and his estate. (Bump on Bank. [5th ed.] 178; *In re Anderson*, 9 Bank. Reg. 360, 363; Blumenstiel on Bank. 209.) The adjudication in the action of *Sanders v. Hart and others* cannot be a bar to this action between different parties and on a different subject-matter. (*Beveridge v. N. Y. E. R. R. Co.*, 112

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N. Y. 1, 19; *Perry v. Dickerson*, 85 id. 345; *Stowell v. Chamberlain*, 60 id. 277; *Danley v. Brown*, 79 id. 390, 397; *Slauson v. Englehart*, 34 Barb. 198, 202; *Bowen v. Mandeville*, 95 N. Y. 237.) The judgment in the case of *Sanders v. Hart*, so far as it adjudged title in Sarah Hart, was based upon no issue raised in the pleadings or any litigation pertinent thereto. It cannot, therefore, be deemed an adjudication upon the issues raised in this action. (*People ex rel. v. Johnson*, 38 N. Y. 63; *Campbell v. Consalus*, 25 id. 613.) The sale on the statutory foreclosure to Mrs. Hart, the defendant's testatrix, after payment of the mortgage, was void as against the assignee in bankruptcy. (*Cameron v. Irwin*, 5 Hill, 272; *Warner v. Blakeman*, 36 Barb. 501; *Mickels v. Dillaye*, 15 Hun, 296.) Judgment in the action subsequently brought by Sanders, the mortgagee, against Joseph Hart, as executor, etc., of Sarah Hart (after the moneys with which Hart had satisfied the mortgage were taken from Sanders by another suit), to declare the mortgage unpaid and still a lien upon the property, is not a bar to plaintiff's recovery in this action. (Code Civ. Pro. § 521; *Dusenbury v. Fisher*, 15 J. & S. 482; *Edwards v. Woodruff*, 90 N. Y. 396; *Fink v. Allen*, 4 J. & S. 350; *Ex parte Christy*, 3 How. [U. S.] 221; Bump on Bank. 212; *Kidder v. Horrobin*, 72 N. Y. 159.)

James B. Lockwood for respondents. The judgment in the case of *Sanders v. Hart* is a complete bar to this action, and this case was correctly disposed of in the courts below on that ground. (*Jordan v. Van Epps*, 85 N. Y. 436; *Patrick v. Shaffer*, 94 id. 423.) It was not incumbent upon the defendant to plead the judgment in the *Sanders* case in bar. (*Krekeler v. Ritter*, 62 N. Y. 372.) The judgment in the action of *Sanders v. Hart* is not relied on merely as a bar to the present action. It goes further than that and adjudges that Mrs. Hart, in her life-time, had acquired an interest in the land in question, which cannot be disturbed. (*Hunt v. Hunt*, 72 N. Y. 229.) The assignee in bankruptcy was a proper party to the action of *Sanders v. Hart*. (*Winslow v. Clark*, 47 N.

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Y. 261 ; *Cook v. Whittle*, 55 id. 150 ; *Platt v. Jones*, 96 id. 24 ; Blumenstiel on Bank. 210.)

VANN, J. The learned judges of the General Term were of the opinion that the judgment in *Sanders v. Hart* was a bar to a recovery by the plaintiff in this action, and they affirmed the judgment rendered by the trial court on that ground. As the assignee in bankruptcy was a party to that action, it was held that he and his assigns were bound by the determination made therein that title to the premises in question was duly vested in Sarah Hart during her life-time. It does not follow, however, that because the assignee was a party to that action, he was a party to the judgment as rendered and entered, or that because he failed to answer the complaint, he conclusively admitted all the facts alleged therein. If judgment had been entered against him by default, assuming that the court had jurisdiction, it would have been as conclusive, as to all facts properly alleged in the complaint, as if it had been rendered after issue joined, trial had and findings made. (*White v. Merritt*, 7 N. Y. 352 ; *Gates v. Preston*, 41 id. 113 ; *Newton v. Hook*, 48 id. 676 ; Herman's Estoppel & Res Adjudicata, § 50 ; Freeman on Judgments, § 330.)

No judgment, however, was entered in that action, by default or otherwise, in favor of the plaintiff Sanders against the assignee, or any other defendant, nor in favor of any defendant against a co-defendant. The only judgment rendered was in favor of the defendants Hart, against the plaintiff Sanders, dismissing the complaint upon the merits, with costs, and affirmatively judging that the proceedings in foreclosure were valid and vested a good title in Mrs. Hart. While a judgment may determine the ultimate rights of the parties on the same side, as between themselves (Code C. P. § 1204), the judgment in question did not purport to do so, but simply determined certain issues between the plaintiff in the action and the defendants Hart. Neither in form nor effect did it determine the ultimate rights of those defendants and the assignee, as between themselves, nor could such a determination have

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been required by any defendant unless he had not only so demanded in his answer, but had also served a copy thereof upon the attorney of each defendant to be affected by the determination who had appeared, and personally upon each defendant so to be affected, who had not appeared. (Code C. P. § 521.) A judgment in favor of one defendant against another cannot be entered upon the default of the latter, unless he has had notice and an opportunity to defend as against his co-defendant. (*Edwards v. Woodruff*, 90 N. Y. 396; *Albany City Savings Inst. v. Burdick*, 87 id. 40.)

A judgment against a plaintiff in favor of a defendant determines nothing between the latter and a co-defendant, because, although both are parties to the action, they are not "adversary parties," as that phrase is applied to the subject of former adjudication. (Herman on Estoppel, § 138.)

No demand was made in any of the pleadings in the action brought by Sanders, which called upon the assignee to assert his rights or defend his title as against Hart, and no adjudication was made between the assignee and any party to the action. As to him the effect was the same as if no judgment had been entered, or as if he had not been made a party. We think, therefore, that the judgment relied upon, although not pleaded as a bar, is conclusive neither as a bar nor as evidence against the plaintiff in this action, who is in privity with the assignee and bound only as he was bound.

It does not follow, however, that the judgment appealed from should be reversed, as the result may be right, even if some of the reasons given for declaring that result are wrong. Both parties claim title to the land involved through Joseph Hart. The plaintiff has all the interest therein which belonged to said Hart on the 6th of July, 1878, when his petition in bankruptcy was filed. That interest was subject to a mortgage, dated August 17, and recorded November 27, 1876, which was subsequently foreclosed, and the defendants are in the position of purchasers in lawful possession under such foreclosure. The earlier title of the defendants must prevail over the later title of the plaintiff, unless the former is defective.

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It is claimed that the mortgage was paid before the sale thereunder was made and evidence was given from which the trial court could have found that such was the fact. The trial court, however, did not so find, and no request was made by the plaintiff for a finding upon the subject, and we have held that "an omission to find facts claimed by the unsuccessful party to be warranted by the evidence, can only be taken advantage of by an exception to a refusal to so find upon request duly made as required by the Code." (*Travis v. Travis*, 122 N. Y. 449, 454.) We cannot look into the evidence for facts to reverse the judgment, except to see whether there is any evidence to support a finding, although we may to sustain it. (*Thomson v. Bank of British North America*, 82 N. Y. 1; *Burnap v. National Bank of Potsdam*, 96 id. 125; *Equitable Co-operative F. Co. v. Hersee*, 103 id. 25.)

The title of the defendants through the foreclosure of said mortgage is not questioned upon any ground except the one already mentioned, and as that must fail, owing to the practice pursued, we think that the conclusion of the trial court that Mrs. Hart acquired a good and paramount title through the foreclosure proceedings was correct, and that it justified the dismissal of the complaint. As the trial court based its action upon two independent grounds, one of which was right, the result is not affected by the fact that the other, as we have held, was wrong.

The judgment appealed from should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

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THE TRADERS' NATIONAL BANK, of San Antonio, Texas,
Respondent, v. CHARLES T. PARKER, Appellant.

When the findings of a court are so inconsistent that they cannot be reconciled, those which are most favorable to the appellant are controlling upon the appellate court.

This rule, however, applies only when the findings cannot by reasonable construction be reconciled; it is the duty of the court to reconcile them, if possible.

An agreement by a creditor to withhold suit against his debtor is a good consideration to support a promise by a third party to pay the debt, although no fixed and definite time of extension is expressly agreed upon. The legal effect of such an agreement is to bind the creditor to withhold suit for a reasonable time, and what is a reasonable time is a mixed question of law and fact, depending for its solution upon the circumstances of the case.

Plaintiff held a note against H. & J., and threatened to bring suit thereon. Defendant, a creditor of H., who was financially embarrassed, requested plaintiff to delay prosecution. Plaintiff offered to extend the time for the payment of the note if defendant would sign it. This he did. No time of extension was agreed upon. It was understood that defendant was at the time intending to attend a sale of certain property of H. under a chattel mortgage, from which it was hoped something might be realized, to be applied in payment of the note. In an action upon the contract so made by defendant, *held*, that it was founded upon a good consideration; that plaintiff waived his right to sue until after such sale.

Atlantic Nat. Bank v. Franklin (55 N. Y. 235); *Perkins v. Proud* (62 Barb. 420), distinguished.

The referee found that the consideration for defendant's contract consisted in plaintiff's agreement to extend the time of payment of the note, but that it did not agree to extend for any definite period, and upon defendant's request; he further found, that plaintiff did not waive the right to sue H. & J., or either of them, whenever it saw fit. *Held*, that the conclusion of the referee that plaintiff did not waive his rights was to be construed as an inference from the evidence, and not as an existing or independent fact, and so was in that respect rather a finding of law than one of fact, and was not controlling.

(Argued December 11, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order

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made January 24, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

David Wilcox for appellant. In order to recover, plaintiff must show some consideration for defendant's signature of the note. (*Good v. Martin*, 95 U. S. 90; *Green v. Shepherd*, 87 Mass. 589; Daniels on Neg. Inst. § 1760; Rand. on Comcl. Paper, § 446; Baylies on Sureties, 56; Brandt on Sureties, § 9; *Tenney v. Prince*, 4 Pick. 385; *Crossan v. May*, 68 Ind. 242; *Klein v. Currier*, 14 Ill. 237; *Parkhurst v. Vail*, 73 id. 343; *Clopton v. Hall*, 51 Miss. 482; *Williams v. Williams*, 67 Mo. 661; *Jones v. Ritter*, 32 Tex. 717; *Barney v. Forbes*, 118 N. Y. 580.) No consideration has been shown for defendant's signature. (*A. Bank v. Franklin*, 55 N. Y. 235; *Bank of Utica v. Ives*, 17 Wend. 501; *Stalker v. McDonald*, 6 Hill, 93; *Perkins v. Bond*, 62 Barb. 420.)

John Lindley for respondent. It was not necessary for the plaintiff to prove any consideration that passed to the defendant for signing the note sued on. (Daniels on Neg. Inst. § 167.) The plaintiff, however, did prove that a good and valuable and sufficient consideration had passed to the defendant for signing the note in suit. (*Manning v. McClure*, 36 Ill. 490; *W. N. Bank v. Cheeney*, 87 Ill. 602; *Roxborough v. Messick*, 6 Ohio St. 448; *Pitts v. Foglesong*, 37 id. 676; Daniels on Neg. Inst. § 830.) An agreement to forbear suit will be a good consideration in a case like this, although no definite time of forbearance is expressly stated; since the law will presume that it will be for a reasonable time. (*Hakes v. Hotchkiss*, 23 Vt. 231; *Elting v. Vanderlyn*, 4 Johns. 237; *Lonsdale v. Brown*, 4 Wash. C. C. 148; *Calkins v. Chandler*, 36 Mich. 320; *Downing v. Funk*, 5 Rawle, 69; *Snighen v. Broughton*, 3 Buest. 206; *Phillips v. Sackford*, Cro. El. 455; Story on Agency, 76; *Payne v. Wilson*, 7 B. & C. 426; *Sidwell v. Evans*, 1 P. & W. 383; *King v. Upton*, 4 Me. 387; *M. L. Ins. Co. v. Smith*, 23 Hun, 535; *Cary v.*

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White, 52 N. Y. 138; *A. N. Bank v. Franklin*, 55 id. 235; *Watson v. Randall*, 20 Wend. 201; *G. Bank v. Penfield*, 69 N. Y. 502; *Paul v. Stevens*, 57 Hun, 173.)

BROWN, J. On or about February 11, 1884, the plaintiff was the owner and holder of an over-due promissory note for \$10,265.65, made by one J. P. Hodgson and one F. W. James, and was insisting upon the payment thereof and threatening to bring suit thereon against the makers. The defendant thereupon, with a view to obtain an extension of time for the payment of said note, affixed his signature thereto under the signatures of Hodgson and James.

This action is upon the contract thus made, and the defense relied upon in this court to defeat a recovery is that no consideration for the defendant's contract was shown.

The referee found that the consideration consisted in the plaintiff's agreement to extend the time of payment of said note, and to delay proceedings for the collection thereof, but that it did not state or agree to extend for any definite period of time; and upon defendant's request he further found that "when the defendant signed the note in suit plaintiff did not waive its right to sue Hodgson and James, or either of them, upon the same whenever it saw fit."

If the latter conclusion is to be treated as one of fact, it is clearly in conflict with the other findings, as an agreement to extend the time of payment, which did not bind the plaintiff to withhold suit for some time, would be no agreement at all, and the defendant would be entitled to the benefit of the rule that when findings are so inconsistent that they cannot be reconciled, those which are most favorable to the appellant are controlling upon the appellate court. (*Redfield v. Redfield*, 110 N. Y. 671; *Wahl v. Barnum*, 116 id. 87-99.)

But it is the duty of the court, if possible, to reconcile these findings. It is only when this cannot, by reasonable construction, be accomplished, that it is bound to accept the finding most favorable to the appellant. (*Green v. Roworth*, 113 N. Y. 462.)

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The findings of the referee, taken together, are to the effect that while the plaintiff was to delay proceedings for collection of the note, and the defendant put his signature to it in consideration of the agreement of the plaintiff to give the makers further time upon the note, the plaintiff did not state or agree that it would extend for any definite time, nor did it waive its right to sue the makers, Hodgson and James, or either of them, upon the note whenever it saw fit. The latter findings were pursuant to request of the defendant, and the last one seems to import the effect of the former as the referee understood it. In that view the others represent the agreement as made between the parties, and the last one without qualification of their terms embraces what the referee seems to treat as the interpretation to which in his view they were entitled. While this does not seem quite consistent with the conclusion of law reached by the referee it is not necessarily inconsistent with the agreement between the parties as found by him. And, therefore, does not control the construction and effect to be given to those findings in support of the judgment.

While all the evidence taken upon the trial is not before us, there is a certificate in the record that the "case contains so much of the evidence as is material to the questions to be raised," and we may presume, therefore, that all the evidence bearing upon the question of consideration is in the case. Referring to the testimony we find that the defendant was a creditor of Hodgson one of the makers of the note. Hodgson was embarrassed financially and other creditors were pressing their claims against him. He was the owner of a herd of 13,000 sheep which were about to be sold at Colorado City, under a chattel mortgage. The defendant desired to purchase the sheep at the sale and wanted to borrow the money from the plaintiff to enable him to do so, and to have the proceedings for the collection of the note withheld. With this object in view he visited the plaintiff at San Antonio with James the joint maker of the note. The plaintiff refused to make the desired loan but it offered to extend the time for the payment of its note if the defendant would sign it.

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Mr. Brownson, the president of the plaintiff bank, testified that he agreed to withhold suit on the note and extend the time of payment. Asked as to the time of the extension he said "I don't think any definite time was agreed upon; it was to depend very much upon the movements of the other creditors of Hodgson. The proceedings at Colorado City were to cut some figure in what we were to do; it was left somewhat to the wishes of Mr. Parker."

And it appeared that Parker thought that something on the plaintiff's debt might be realized out of the sale of the sheep and that he was to go to Colorado City which was about eighteen hours ride by railroad from San Antonio and attend the sale, and that it was contemplated by the parties that he should advise the plaintiff from that place, and that he did so, and that Mr. Brownson went there at his request, but he refused to advance money to buy the sheep.

Mr. Thornton, the cashier of the bank, testified that they were pressing Hodgson for a settlement and threatened him with suit. That it was about term time of the court and they had threatened to put the paper through at that term * * * and the proposition was made that if the bank was satisfied on the paper it would withhold suit. It thus appears that nothing was said about the right of the plaintiff to sue whenever it saw fit, and the conclusion of the referee that the plaintiff did not waive its rights is an inference from the evidence and was not an existing or independent fact itself and as was said in *Green v. Roworth (supra)*, "it was in that respect rather a finding upon a question of law than one of fact." It certainly was the intention and agreement of the parties that sufficient time should be allowed by the bank during which the defendant could go to Colorado City and examine into the condition of Hodgson's affairs there, so that he might judge of the possibility of realizing something out of the sale of the sheep that could be applied to the payment of the plaintiff's note, and this was a matter of considerable importance and benefit to him. And it is clear, I think, that suit was to be withheld upon the note until after the sale at Colorado City, and whether

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tions issued thereon and levies made thereunder, as in violation of said act, the complaint alleged in substance that S., a few hours before she made an assignment, in contemplation thereof and for the purpose of giving preferences in fraud of the assignment, confessed the judgments in question; that immediately after the entry thereof executions were issued upon them, which, just before the delivery of the assignment, were levied upon all her property, and that the same was not worth three times the amount of the judgments; that said executions were issued and levies made in contemplation of the assignment, and for the purpose of preferring the judgment creditors, in fraud of the assignment; also that the assignee, upon being requested, had refused to bring suit to set aside the judgment. From the assignment and the judgment-rolls, copies of which were annexed to the complaint, it appeared that the debts for which the judgments were confessed were preferred in the assignment, they being the only preferences, except wages, etc., of the employes of the assignor. Upon demurrer to the complaint, defendants claimed that, as plaintiffs were not judgment creditors, they had no standing in court to maintain the action. *Held*, untenable, as plaintiffs were not seeking to attack the assignment, but, as beneficiaries of the trust, were seeking to uphold and enforce it; that such an action was maintainable by any creditor, whether a judgment creditor or a creditor at large.

Defendants, the judgment creditors, also claimed the complaint to be insufficient, as it did not allege that they knew S. intended to make an assignment. *Held*, untenable, as the complaint alleged that the acts of the judgment creditors, i. e., the issuing of executions and the levies thereunder, as well as the acts of their debtor, were in contemplation, and in fraud, of the assignment.

Reported below, 54 Hun, 409.

(Argued December 14, 1891; decided January 20, 1892.)

APPEAL from a judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1889, which affirmed an interlocutory judgment entered upon the decision of the court at Special Term, overruling a demurrer to the complaint herein.

This action was brought by the plaintiffs, as general creditors of the defendant Josephine M. Soussman, to set aside three judgments confessed by her in favor of certain of the other defendants, together with the executions issued thereon and levies made thereunder, as in violation of the statute restricting preferences in general assignments for the benefit

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of creditors. (Laws 1887, chap. 503.) Several of the judgment creditors demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The General Term affirmed the interlocutory judgment of the Special Term, overruling such demurrers, but certified that the question involved was of sufficient importance to render a decision by this court desirable before proceeding further. (Code Civ. Pro. § 190, par. 4.)

The facts, so far as material, appear in the opinion.

Alex. Blumensteil for appellants. There being no allegation in the complaint that Freedman Brothers, the appellants and judgment creditors, knew that the debtor was insolvent or that she intended to make a general assignment, no cause of action was made out. (*Manning v. Beck*, 129 N. Y. 1.) The plaintiffs have no standing in court to bring this action. (*Southard v. Benner*, 72 N. Y. 424, 426, 427; *Geery v. Geery*, 63 id. 256; *Adsit v. Butler*, 87 id. 585; *Borve v. Arnold*, 31 Hun, 256; *Sullivan v. Miller*, 106 N. Y. 635, 641; *Button v. Rathbone*, 43 Hun, 147.)

John W. Boothby for respondents. The plaintiffs, as general creditors of the defendant Soussman, the assignor, can properly maintain this action. (*Dewey v. Moyer*, 72 N. Y. 78; *Bate v. Graham*, 11 id. 237; 14 How. [U. S.] 29; *Crouse v. Frothingham*, 97 N. Y. 113; *Shyer v. Lockhard*, 2 Tenn. Ch. 365; *Weir v. Tannehill*, 2 Yerg. 57; *Goncelier v. Foret*, 4 Minn. 13; *McDougald v. Dougherty*, 11 Ga. 570; *Jones v. Dougherty*, 10 id. 273; *Hayes v. Doane*, 11 N. J. Eq. 84; *Holt v. Bancroft*, 30 Ala. 193; *Kellogg v. Root*, 23 Fed. Rep. 525; *White v. Cotzhausen*, 129 U. S. 329; *Spring v. Short*, 90 N. Y. 546.) The judgments entered by confession, including that of the appellants, Freedman Brothers, were confessed and entered, the executions issued and levies made in contemplation of the assignment, and as a part of the scheme of the failure, for the purpose of preferring those favored creditors for more than the law allowed, and are, therefore, fraudulent and void as against the assignee. (Laws of

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1887, chap. 503; *Richardson v. Thurber*, 104 N. Y. 606; Laws of 1884, chap. 328; *Preston v. Spulding*, 120 Ill. 208; *White v. Cotzhausen*, 127 U. S. 329; *Berry v. Cutts*, 42 Me. 445; *Van Patten v. Burr*, 52 Iowa, 518; *Fuller v. Hasbrouck*, 46 Mich. 81; *Perry v. Holden*, 39 Mass. 277; *Livermore v. McNair*, 34 N. Y. Eq. 478; *Caryl v. Russel*, 13 N. Y. 194; *Bell v. Leggett*, 7 id. 176.)

VANN, J. The plaintiffs were general creditors of the defendant Soussman on the 14th of May, 1888, when she made a general assignment of all her property for the benefit of her creditors to the defendant Phillips, who accepted the same and it was thereupon recorded in the office of the clerk of the city and county of New York, at a quarter past twelve in the afternoon of that day. A few hours before, Mrs. Soussman, being insolvent, confessed a judgment in favor of the defendants Jaffrey and others for the sum of \$2,110.80; a second, in favor of the defendant Sigisman for \$2,056.38, and a third, in favor of the defendants Freedman for \$2,802.27, and the respective judgment-rolls were filed in said clerk's office at seven, eight and nine minutes past ten in the forenoon of the day on which said assignment was made and recorded. Immediately after the entry of said judgments, executions were issued thereon against the property of Mrs. Soussman to the defendant Grant, as sheriff, who by virtue thereof, just before the delivery of said assignment, levied upon all her property, which was not worth three times the amount of said judgments. After setting forth the foregoing facts the complaint further alleged "that the said judgments were confessed and the said executions issued and levies made, in contemplation of the said assignment and for the purpose of preferring the said persons in whose favor the said judgments were confessed out of the property of the said defendant Soussman, in fraud of the said assignment, for more than one-third of the net assets of the said defendant Soussman and to prevent the said assets from going into the hands of the defendant Phillips as such assignee, and being distributed to the plaintiffs and the

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other creditors of the said defendant Soussman, pursuant to the statute in such cases made and provided and pursuant to the provisions of the said assignment, and are fraudulent and void as against the defendant Philips, as assignee."

It was further alleged that the assignee, after due notice of the facts, refused to bring an action to set aside said judgments, executions and levies, although requested by the plaintiffs so to do. The relief demanded was that the judgments, executions and levies be declared void as to the assignee; that the sheriff be directed to turn over the property levied upon by him to the assignee; that the proceeds thereof be applied pursuant to the terms and conditions of said assignment, and that all of the defendants, except the assignee be restrained from disposing of or interfering with the property so levied upon.

A copy of the assignment and of the several rolls of the confessed judgments were annexed to and made a part of the complaint, from which it appeared that the debts for which such judgments were recovered were preferred in the assignment and that they were the only preferences therein, except wages and salaries actually owing to the employes of the assignor.

In support of their demurrer, the defendants contend that as the plaintiffs are not judgment creditors of the assignor, they have no standing to maintain an action of this character. If this were an ordinary creditor's suit, brought to set aside the assignment as a fraudulent obstruction to the rights of the plaintiffs, it would be necessary for them to allege that they had exhausted their remedy at law. It is well settled that a simple contract creditor cannot attack, as fraudulent, the transfer by his debtor of property applicable to the payment of the debt, until after the recovery of judgment, the issue and levy of an execution, or its return unsatisfied. (*Dunlevy v. Tallmadge*, 32 N. Y. 457; *Adee v. Bigler*, 81 id. 349; *Adsit v. Butler*, 87 id. 585; *Wait on Fraudulent Conveyances and Creditor's Bills*, 106; Code C. P. § 1871; 2 R. S. 173.)

The plaintiffs, however, do not attack the assignment, but seek to uphold and enforce it. Their theory is that it is a valid instrument and that it vested in the assignee the legal title to all the

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property of the assignor. They rest upon the assignment, making their action subsidiary and not hostile thereto, and aim to protect the property in the hands of the assignee, as they claim he should have protected it, to the end that its proceeds may be distributed by him according to the provisions of the assignment. As beneficiaries under the trust they are trying to have it enforced, through the assignee, by taking such action as they allege he should have taken, not for their exclusive advantage, but for the benefit of all similarly situated. They do not seek to discover assets or to obtain a lien, but to cause certain effects in which they have an interest to be administered and distributed according to the assignment without spoliation or waste. A *cestui que trust* is not required to establish his debt by an action at law in order to compel an enforcement of the trust, or to protect the trust property from unlawful interference. As the plaintiffs acknowledge the validity of the assignment and come in under it, what use could they make of a judgment if they had one? If they were in a situation to issue an execution it would be improper for them to levy upon the assigned property. What could they do in aid of the assignment with, that they cannot as well do without a judgment recovered and execution returned? Their ultimate right to share in the assets and the refusal of the assignee to bring an action that is necessary for the protection of the assets, gives them the right to bring it as auxiliary to the trust. His right to maintain an action depends on the act of 1858 (L. 1858, ch. 314), and their right comes through his refusal to sue. As he can sue for the benefit of simple contract creditors (*Southard v. Benner*, 72 N. Y. 424), why cannot simple contract creditors sue, making him a party, upon his refusing to sue in their behalf? What reason is there for limiting action to judgment creditors, when creditors at large have an equal right to share in the benefits? What virtue is there in a judgment as the basis of an action, when it is not needed in order to fully share in the fruits of the action? The line of reasoning suggested by these inquiries finds support in the authorities, which recognize a distinction between an action

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of this kind and a creditor's bill. The function of a creditor's bill is to establish and enforce a lien upon property alleged to belong to the debtor, to take it from the possession of whosoever may claim to own it and to cause it to be sold to pay the judgment creditor's debt, who thus obtains an advantage over all the other creditors. It is exclusive in object and result and benefits the active at the expense of the inactive creditor. It is necessarily hostile to a general assignment which it must destroy in order to succeed as to any property transferred thereby. (*Loos v. Wilkinson*, 110 N. Y. 195.)

The act of 1858 authorized a new class of actions, analogous in many respects to creditor's bills, to be brought for the benefit of all the creditors alike, by the assignee or other representative of an insolvent estate, to set aside fraudulent transfers by the debtor. Such actions require no lien, but are maintainable by force of the statute. (*Southard v. Benner*, *supra*; *Reynolds v. Ellis*, 103 N. Y. 116, 123.) When the assignee neglects or refuses to bring such an action, after notice of the facts, as was declared by this court in *Dewey v. Moyor* (72 N. Y. 70, 78), "it is abundantly established that the creditors may commence an action to reach the property (fraudulently transferred), making the assignee, the debtor and his transferees parties defendant." So in *Crouse v. Frothingham* (97 N. Y. 105, 113), it was said that if the "assignee refuses in a proper case to proceed and get in the assigned property, the creditors collectively, or one in behalf of all who may come in and join, may compel the execution of the trust in equity." While in the cases cited the actions were brought by judgment creditors it was not intimated that this was essential, and we find no case that so holds.

We think that the action can be maintained by any of the creditors who would be benefited by the result, including both judgment creditors and creditors at large. (*Harvey v. McDonnell*, 113 N. Y. 526; *Preston v. Spaulding*, 120 Ill. 208, 214; *Goncelier v. Foret*, 4 Minn. 1; *Holt v. Bancroft*, 30 Ala. 193, 204; *McDougald v. Dougherty*, 11 Ga. 570; *Weir v. Tannehill*, 2 Yerger, 57; 2 Barb. Ch. 149.)

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The appellants further contend that their demurrer should be sustained, because it does not appear from the complaint that they knew that the assignor intended to make an assignment.

The act of 1887 changed the policy of the state with reference to preferences in general assignments. (L. 1887, ch. 503, § 30.) Prior to the passage of that act there was no restriction upon the power of an insolvent debtor to give such preferences as he chose when making an assignment, either by that instrument alone, or by other transfers in connection with it. The object of the act was to change the law by placing a limit to the power to prefer in a general assignment, and it should be liberally construed, as has been held in relation to similar statutes, "so as to suppress the mischief and advance the remedy." (*White v. Cotzhausen*, 129 U. S. 329, 441; *Preston v. Spaulding*, 120 Ill. 208; *Appeal of Miners' National Bank*, 57 Pa. St. 193, 200.)

Accordingly the assignor should not be allowed to subvert the statute by artifice or evasion, especially when the creditor preferred participated in the unlawful design. Whatever is done in connection with, or in contemplation of the assignment, with the intent to defeat the operation of the statute, falls within the spirit of its prohibition and should receive the condemnation of the courts. When the assignment is part of a scheme to circumvent the law, and judgments are confessed by the debtor, executions issued thereon by the creditors and levies made upon the property of the debtor in their behalf, as parts of the same scheme, it is the duty of the courts to see that the object of the legislature is not defeated by such acts, which although not a part of the assignment, are done in contemplation of it and with the intent of both debtor and creditor to frustrate the statute. Such is the case made against the defendants by the complaint as we construe it. It appears from that part of the complaint already quoted that the "Judgments were confessed * * * in contemplation of the said assignment, and for the purpose of preferring the said persons in whose favor the said judgments were confessed, out of the property of the said defendant Soussman in fraud of the

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said assignment, etc.” Those were the acts and this the intent of the debtor. But it is also as distinctly alleged that “the said executions (were) issued and levies made in contemplation of the said assignment and for the purpose of preferring * * * in fraud of the said assignment * * * and to prevent the said assets from going into the hands of the * * * assignee and being distributed * * * pursuant to the statute * * * and pursuant to * * * the assignment, etc.” These were the acts and this the intent of the judgment creditors. All the transactions which the plaintiffs seek to set aside are alleged to have been done in contemplation of, as well as in fraud of, the assignment, and with the intent to prevent a distribution of the property of the assignor according to the assignment and the statute. The debtor confessed the judgments and the creditors issued the executions and caused the levies to be made, participating in the same fraudulent purpose and jointly contemplating, that is, expecting or looking forward to, the assignment as about to be made. The connection between the assignment and the acts alleged to be illegal is emphasized by the preference in the former of the same debts for which the judgments were confessed, so that if the judgments are set aside the judgment debtors will still be preferred to the extent of one-third of the assets of the assignor, or all that the law allows. Their effort to secure more than this by a palpable evasion of the statute should not succeed, and the instrumentalities employed to effect that object have been properly adjudged void by the judgment of the courts below. (*Berger v. Varrelmann*, 127 N. Y. 281; *Manning v. Beck*, 129 id. 1.)

The cases cited leave nothing further to be said upon the subject as, according to either, the complaint sets forth a good cause of action, so far as the point under consideration is concerned.

The judgment should be affirmed, with costs, but with leave to the appellants to answer on payment of costs.

All concur, except BRADLEY, J., not voting.

Judgment accordingly.

Statement of case.

JAMES H. GOODSSELL, Appellant and Respondent, v. THE
WESTERN UNION TELEGRAPH COMPANY, Appellant and
Respondent.

The A. & P. Telegraph Co. organized a department for the purpose of supplying newspapers with news transmitted by its wires; this department was entitled "The National Associated Press, James H. Goodsell, President." Subsequently, said Goodsell, the plaintiff herein, entered into a contract with said company, he contracting, in the name so given to the department, to furnish news to be transmitted by it at prices named. Thereafter, said company assigned and transferred to defendant all of its property, business, rights and privileges, etc., the latter undertaking and assuming performance of the contract in question. *Held*, that plaintiff could maintain an action in his own name for a breach of the contract; that as the contracting company was not defrauded or misled by the use of the name adopted by plaintiff, neither it nor its assignee could avoid the contract because of such use.

By the contract, plaintiff was to pay a certain sum per month, the telegraph company to transmit a certain number of words daily; for any excess plaintiff was to pay a rate specified for each word. The contract provided for the transmission of news over five circuits, one named the "far western." Subsequently an arrangement was made under which plaintiff paid for two operators at Pittsburg to repeat dispatches to towns included in the far western circuit. The amount paid for the two operators was more than the charges under the contract for excess of words. *Held*, a finding was proper that this arrangement took the place of the far western circuit, and that consequently defendant was not entitled to charge for the excess of words sent over that circuit.

The contract provided that of the specified number of words for the regular reports, one-third should be sent in the day-time and two-thirds at night; that if the telegraph company should transmit news reports to any greater number of places than thirty-eight, which were enumerated, it should receive for the excess over and above the monthly payment, a certain rate per word, and in case any one of the places named should cease to take the news service, and if no other place was substituted, the company would make a rebate from the monthly payments. All of the places named did not take the reports, and only fifteen or sixteen took them day and night. The reports were sent to other places not named, but at no time were there thirty-eight which received the day reports or the night reports. *Held*, that plaintiff was entitled to have both the day and night reports transmitted to thirty-eight places for the regular monthly charge, and it was not requisite that they should be sent to the same places, but that the night reports might be sent to different places from those receiving the day reports.

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In March, 1882, defendant's president wrote to plaintiff that it would no longer transmit the news reports at the contract prices, but would from that date charge an increased rate as stated, and unless this was paid that the service would be discontinued. Plaintiff declined to pay the increased rate, and insisted upon the performance of the contract. In reply, said president stated that his company repudiated the contract; he gave plaintiff time to communicate with his customers; being unable to make any arrangements with them to pay the increased price, he so notified defendant on June 20, 1882, stating that he did not waive his claims under the contract, but was willing to carry it out, and demanded performance by defendant. On June 24, plaintiff stopped delivery of his reports. *Held*, that plaintiff was entitled to recover damages for breach of the contract on defendant's part; that, as it had unqualifiedly repudiated the contract, only giving plaintiff time to communicate with his customers, when he failed to make new terms with them and so notified defendant, the extension of time was at an end, the contract was to be considered as abandoned by defendant, and plaintiff was justified in so treating it by stopping his reports.

Reported below, 26 J. & S. 26.

(Argued December 14, 1891; decided January 20, 1892.)

CROSS-APPEALS from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 5, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Rush Taggart for appellant. There was no breach of a contract made with plaintiff individually. (*Berkely v. Hardy*, 5 B. & C. 355.) The referee and the court below erred in finding that the evidence established a total breach of the contract under the second cause of action. (*Wakeman v. W. & W. M. Co.*, 101 N. Y. 210; *Taylor v. Bradley*, 39 id. 120; *Fish v. Foley*, 7 Hill, 54; *Johnstone v. Milling*, L. R. [16 Q. B. Div.] 460; *M. S. & I. Co. v. Naylor*, 9 id. 646; *Zuch v. McClure*, 98 Penn. St. 541; *L. Ins. Co. v. McAden*, 109 id. 399; *Smith v. Lewis*, 24 Conn. 624; *Haines v. Tucker*, 50 N. H. 307; *Nelson v. Morse*, 52 Wis. 240; 2 Pars. on Cont. 809; *Ehrensberger v. Anderson*, 3 Exch. 147; *Anson*

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on Cont. 283; *People v. E. M. L. Ins. Co.*, 92 N. Y. 105; *Higgins v. D., L. & W. R. R. Co.*, 61 id. 553; *Noyes v. Philips*, 61 id. 412; *Sanges v. Wood*, 9 Johns. Cas. 416; *Littlefield v. Brown*, 1 Wend. 398; 11 id. 467, 470; *Bowen v. Mandeville*, 95 N. Y. 240; *Wilkinson v. Varsity*, L. R. [6 C. P.] 206; *Reid v. Hoskins*, 6 E. & B. 953; Bishop on Cont. §§ 827, 829; *M. I. & S. Co. v. N. B. & Co.*, L. R. [9 Q. B. Div.] 648; *Simpson v. Crippen*, 8 id. 14; *Blackburn v. Reilly*, 47 N. J. L. 290.) The action of the plaintiff in abandoning the service of news reports on June 22, 1882, was voluntary and in consequence of a contract made with the United Press Association on June 21, 1882, and not in consequence of any act of the defendant. (Whart. on Neg. § 134; *M., etc., R. Co. v. Kellogg*, 94 U. S. 474; *Griffin v. Colver*, 16 N. Y. 489; *Masterton v. Mayor*, 7 Hill, 61; *Kiley v. W. U. T. Co.*, 39 Hun, 158; *Lowery v. W. U. T. Co.*, 60 N. Y. 198; *Hall v. W. U. T. Co.*, 124 U. S. 444; Bishop on Cont. § 832; *Corney v. Newbery*, 24 Ill. 203; *Parmelee v. Adolph*, 28 Ohio St. 10; *Henderson v. Hicks*, 58 Cal. 364.)

George W. Miller for respondent. The contract was valid and plaintiff had an individual interest in it. (26 J. & S. 26; *Com. Bank v. French*, 21 Pick. 486; *Mangham v. Sharpe*, 17 C. B. [N. S.] 443; *Davis v. Garr*, 6 N. Y. 124; *Merritt v. Seaman*, 6 id. 168; *De Witt v. Walton*, 9 id. 571; Code Civ. Pro. § 3339; *Bryant v. Eastman*, 7 Cush. 111; *Bush v. Cole*, 28 N. Y. 261; *Minturn v. Pain*, 7 id. 224; *Raynor v. Grote*, 45 M. & W. 358.) The claim to the effect that the contract is void by reason of section 69 of chapter 1, part 4, title 6, of the Revised Statutes, relating to misdemeanors, is unfounded. (*Gray v. Siebald*, 97 N. Y. 472.) The agreement contained in the seventh paragraph of the contract, to keep and render correct accounts and to make monthly settlements, was a material and substantial part of the contract, one without the performance of which by defendant, plaintiff was under no obligation to go on and perform on his part. (*Barruse v. Madan*, 2 Johns. 148; *Parmelee v. O. & S. R. R. Co.*, 6

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N. Y. 80.) All the acts and neglects and refusals constituted such a decided breach, and were so unequivocal in their terms, as to release plaintiff from any and all further offers of performance on his part, and fully authorize him at any time to treat the contract as broken by defendant and recover damages. (*Crary v. Smith*, 2 N. Y. 60; *Burtis v. Thompson*, 42 id. 246; *Selleck v. Tallman*, 87 id. 106; *Howard v. Daly*, 61 id. 362; *C. Co. v. Gordon*, 6 Wall. 561; *Danolds v. State*, 89 N. Y. 36; *McMaster v. State*, 108 id. 542, 552, 553; *Cort v. A. R. R.*, L. R. [17 Q. B. Div.] 127.) The proposition that non-payment, refusal to pay, and adjudication of such non-payment, and for the amount so not paid, as agreed, is not evidence of a breach which will justify plaintiff in abandoning the contract and recovering damages, is untenable. (*Canal Co. v. Gordon*, 6 Wall. 561; *Graff v. Cunningham*, 109 N. Y. 369; *McMaster v. State*, 108 id. 542.)

HAIGHT, J. This action was brought to recover an alleged balance due upon a contract, and damages for a breach thereof.

The defense was that the contract was illegal and not made with the plaintiff; that there was nothing due thereon, and that there had been no breach thereof by the defendant.

The agreement was made and entered into on the 21st day of January, 1881, between the Atlantic and Pacific Telegraph Company of the first part, and the National Associated Press, James H. Goodsell, President, party of the second part. By its provisions the National Associated Press undertook to furnish news to be transmitted by the Atlantic and Pacific Telegraph Company, and the telegraph company undertook to transmit the same to the points named in a schedule attached, and to such other points within the territory situate upon the lines of the company lying west of Portland, Me., and extending as far as Omaha, Neb., and lying north of Richmond, Va., and Nashville, Tenn., and south of Detroit, Mich., and Milwaukee, Wis., but including the places named, for the purpose of supplying the newspapers published within such territory, taking the news reports of the National Associated Press.

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The regular service of the National Associated Press to be transmitted by the telegraph company was not to exceed on an average 6,750 words per day, one-third of which was to be transmitted in the day-time and two-thirds thereof in the night-time, between hours specifically designated. The contract further provided: "Fourth. For the transmission and delivery to newspapers and subscribers at all the points or places named in Schedule 'A' hereunto annexed, or to the successors and assigns of such newspapers and of the subscribers of said news reports, the said National Associated Press shall pay the said telegraph company the sum of \$5,000 per month, on or before the fifteenth day of each and every month during the continuance of this agreement, which amount of \$5,000 per month shall be in full payment for the transmission and delivery of an average of 6,750 words per day as hereinbefore specified. Provided, however, that in case the average of the entire number of words transmitted by said telegraph company in any month should exceed 6,750 per day the telegraph company shall receive an additional payment for said excess at the rate of one-half a cent a word for each circuit over which such excess of matter is sent. That it is also mutually covenanted and agreed that the said National Associated Press shall have the right to require the said telegraph news service to be transmitted and delivered as aforesaid to newspapers or subscribers at any point or place within the territory and located upon the lines owned, operated, leased or controlled by said telegraph company, upon the following conditions, namely: That in case the said news reports shall be transmitted by said telegraph company to any greater number of points or places than the number enumerated in Schedule 'A' hereto annexed, the said telegraph company shall receive over and above the monthly payment hereinbefore provided for an additional payment computed at the rate of one-eighth of a cent per word for all matter transmitted to each place or point in excess of the whole number of points or places enumerated in Schedule 'A,' and it is also mutually covenanted and agreed that in case any of the points or places supplied with the news reports as aforesaid

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should, at any time during the continuance of this agreement, cease to take the news service of the said National Associated Press, the telegraph company shall, if some other place be not substituted for the place at which such reports are discontinued, make an allowance or rebate from the said monthly charge of \$5,000 at the rate of one-eighth of a cent per word per day for each and every place ceasing to take said news service. Provided, however, that the entire payment of said telegraph company by said National Associated Press under this agreement shall not be less in any one month than at the rate of fifty thousand dollars per annum for the transmission and delivery of the aforesaid news reports to all places or points to which said news reports may be sent under this agreement." The contract further provided that the collection of all moneys due or to accrue from papers or subscribers under the operation of the contract for news transmitted shall be made by the telegraph company for and on the account of the National Associated Press; that a full and detailed account of such collections shall be kept by the telegraph company, which account shall always be open to the inspection of the party of the second part, and that the same shall be furnished and rendered in due form by the telegraph company to the National Associated Press monthly. And payments of the balances, if any, due the National Associated Press by the telegraph company shall be made on or before the fifteenth day of each and every month. The agreement was to continue in force for the period of ten years from the 1st day of February, 1881.

Subsequently and on or about the 3d day of February, 1881, the Atlantic and Pacific Telegraph Company sold, assigned and transferred to the Western Union Telegraph Company, the defendant in this action, all its telegraph lines, appurtenances, business, property rights and privileges, and the defendant undertook and assumed performance of all the valid contracts of the Atlantic and Pacific Telegraph Company, including the contract in question, and on or about the 1st day of March, 1881, proceeded to the performance thereof.

As we have seen, the first defense is that the contract was

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illegal and not with the plaintiff. It appears that there formerly existed an association known as The American Associated Press, and that it was engaged in supplying papers with news transmitted over the wires of the Atlantic and Pacific Telegraph Company; that such association ceased to exist, and thereupon the telegraph company commenced the collection and transmission of news to newspapers on its own account, and for the purpose of enabling it to carry on the business, the plaintiff was employed, and a bureau or department for the business was organized and given the name of "The National Associated Press, James H. Goodsell, President." The business was carried on in this manner for several years, and until the contract in question was made. The contract was made with Goodsell, but in the name which had formerly been adopted and under which the business was known to the public, which fact was well known and understood by the officers of the Atlantic and Pacific Telegraph Company. That company consequently was not defrauded or misled by the use of the name adopted by the plaintiff, and neither it nor its assignee can, under these circumstances, be permitted to avoid the contract by reason thereof.

The referee has found as facts that the collections made by the defendant for the plaintiff, under the contract, amounted in the aggregate to the sum of \$157,800; that the telegraphic services rendered by the defendant to the plaintiff from the 3d of February, 1881, to the 22d of June, 1882, under the terms and conditions of the contract, amounted to the sum of \$78,500, for what is named as the regular service, and the sum of \$16,772.58 for additional or extra service in excess of 6,750 words per day, as provided in the fourth clause of the contract, amounting to the sum of \$95,272.58, which the defendant was authorized to retain from the collections made; that it had paid to the plaintiff the sum of \$45,750, leaving a balance due and owing him of \$16,777.42.

As to the amounts collected by the defendant and paid over to the plaintiff there is no dispute. The contention arises upon the amount that should be allowed to the defendant for extra

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services rendered under the fourth clause of the contract. As we have seen, the amount so allowed by the referee was \$16,772.58. The items composing such amount are not stated by him, but they are stated in the opinion of the General Term as follows:

Schedule "Z".....	\$6,387 48
Schedule "Z 1-2".....	4,863 37
Schedule "X" (two items showing special arrangements, Lawrence).....	630 00
Auburn "Despatch".....	390 00
Schedule "X 1-2" (special arrangement, Auburn).....	120 00
Schedule "Y," less far western circuit.....	4,313 28
Schedule "Y 1-2," less far western circuit.....	68 45
Total	<u>\$16,772 58</u>

Schedule "Z" is for messages received at New York by the plaintiff, marked "collect," from places not on the schedule; and "Z 1-2" is for miscellaneous bills about which there is no controversy. Schedules "Y" and "Y 1-2" give the excess of words transmitted over and above the 6,750 provided for in the contract for the eastern, western, far western, southern and state circuits. Under the provisions of the contract the plaintiff was to pay one-half a cent for each word of such excess for each circuit over which the same was sent. The only controversy over these schedules arises out of the including of the fifth or far western circuit, the contention being that there were only four circuits. It appears from the evidence that an arrangement was made with the plaintiff by which two additional operators should be hired at Pittsburg, one for night and the other for day service, to repeat the despatches to the far western towns, and that he was charged therefor in Schedule "Z 1-2," \$1,345.55. It is claimed that this arrangement took the place of the far western circuit and that consequently he should not be charged for the excess of words sent over that circuit. The General Term appears to

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have adopted that view. The amount for the transmission of the excess over that circuit, as we figure it, amounts to \$1,186.21, a sum less than the plaintiff paid for the two repeaters at Pittsburg. It would hardly seem right that the plaintiff should be required to pay the defendant for the regular service and the excess provided for under the contract, and still pay the defendant for its operators, and we are consequently inclined to the view that the employment of the repeaters at Pittsburg was understood to be in lieu of the additional compensation for the far western circuit.

The chief contention arises over Schedules "X" and "X 1-2." They contain a statement showing the number of words transmitted to places not included in Schedule "A" attached to the contract. It is claimed that the defendant under the provisions of the contract is entitled to one-eighth of a cent per word for the number of words transmitted to the places therein named. As to the Lawrence "Eagle," which was supplied with the reports for seven months under a special arrangement of \$90.00 per month, making a total of \$630.00; and the Auburn "Despatch," which was furnished under a special rate of \$10.00 per week, making \$390.00 and \$120.00, there appears to be no controversy. Those items were, therefore, properly allowed. The plaintiff however claims that as to the other places named in these schedules, they were substituted for other places named in Schedule "A," which did not take the reports, and that, therefore, he should not be charged for the transmission of the reports to these places. This involves the construction of the fourth provision of the contract. As we have seen, it provides "that in case the said news reports shall be transmitted by said telegraph company to any greater number of points or places than the number enumerated in Schedule 'A' hereto annexed, the said telegraph company shall receive, over and above the monthly payment hereinbefore provided for, an additional payment computed at the rate of one-eighth of a cent per word for all matter transmitted to each place or point in excess of the whole number of points or places enumerated in Schedule 'A.'" There are thirty-eight places

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enumerated in Schedule "A," but all of them did not take the reports. The right of the plaintiff to substitute other places upon the company's lines within the territory named, for the places enumerated in Schedule "A," not taking the reports, is not questioned, but the plaintiff claims that he has the right to have both the day and night report transmitted to thirty-eight places under the regular service of \$5,000 per month. In other words, that he may have the day report transmitted to thirty-eight different places, and that he may have the night reports also transmitted to thirty-eight places, notwithstanding that they may be different from the places to which the day report is transmitted. This claim is controverted, and it presents the serious question for our consideration. It is one in which the minds of the parties may honestly differ, and is not free from difficulty. The amount claimed under these schedules, deducting the items allowed, is \$13,225.60. Only fifteen or sixteen of the places enumerated in Schedule "A" took the report both day and night. At no time were there thirty-eight places that received the day report, or thirty-eight that received the night report. It ran from twenty-five to thirty that received the day report, and from twenty-nine to thirty-seven that received the night report. Under the contract, but one-third of the daily report could be transmitted in the day-time. The other two-thirds had to be transmitted at night. Under the construction claimed by the defendant, the plaintiff would have to pay for all places taking the day report only, as much as he would where they took both the day and the night report, although the matter transmitted was but one-third in amount of that which he had the right to have under the contract. It is not shown that the expenses of such transmission would be increased by a change of the places in which the messages should be dropped, provided the number of drops are not increased, and it is, therefore, not apparent that the defendant will suffer if the construction contended for by the plaintiff is sustained. By adopting it, he is given the benefit of his contract of having 6,750 words per day transmitted with thirty-eight drops, for the monthly allowance agreed

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upon ; whilst under the other construction he must necessarily be deprived of the full benefit of his contract, unless he can find thirty-eight places which will take both the day and the night report. But if plaintiff's construction should not be adopted, it would then follow that he would be entitled to a rebate from the monthly charge of \$5,000. The contract provides "that in case any of the points or places supplied with the news reports, as aforesaid, should at any time during the continuance of this agreement, cease to take the news service of the said National Associated Press, the telegraph company shall, if some other place be not substituted for the place at which said reports are discontinued, make an allowance or rebate from the said monthly charge of \$5,000, at the rate of one-eighth of a cent per word per day for each and every place ceasing to take said news service." It was provided, however, that such rebate should not exceed \$10,000 per year, which in this case would amount to about \$13,000, and thus equal the excess claimed by the defendant. To avoid this result, it is claimed that there should be taken out of Schedules "X" and "X 1-2" enough places and added to the places enumerated in Schedule "A," to make the night service up to thirty-eight in number, and that the defendant should be allowed the extra compensation for serving the other places named in the schedules, amounting to the sum of \$9,475.10. But we do not understand that the contract requires the plaintiff to do this. Inasmuch as the day service to these places contains but one-third of the number of words, he may prefer to pay the one-eighth of a cent per word for the service, and then have his rebate upon the monthly payments. Whilst the question may be upon the border, we are inclined to the opinion that the contract should receive the construction indicated, and that the amounts claimed under these schedules, except as to the amounts already included, should be disallowed.

The appellant also claims that it should have been allowed the item of \$11,934.48 for messages received at New York from the places named in Schedule "A." As we understand, these messages were items of news gathered at places named

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and transmitted to New York for publication. An allowance of one-half a cent per word on such messages has already been made in Schedule "Z," which is all that we understand the defendant to be entitled to under the provisions of the contract.

It follows that the findings of the referee as to the amount due and owing to the plaintiff under the contract should be sustained.

The referee has found that the defendant committed a breach of the contract, and awarded the plaintiff thirty thousand dollars as damages therefor. The breaches found were that the plaintiff requested the defendant to deliver telegraphic news reports to various papers within the territory and on the lines described in the contract, and that the defendant failed, neglected and refused to do so; that it also failed to render him an account and pay over the balance on hand on or before the fifteenth day of each month, and that it abandoned the contract and refused to carry out its provisions or transmit the plaintiff's reports. The first conversation to which our attention is called as bearing upon the refusal of the company to continue the performance of the contract, occurred in the month of December, 1881, between the plaintiff and Dr. Green, the president of the defendant. The plaintiff testified that the doctor informed him that a question had arisen in regard to the prices charged for the transmission of the plaintiff's news; that the relations between the Western Union Company and the New York Associated Press had become strained, the press taking the ground that the defendant company was discriminating in plaintiff's favor, giving rates largely below the rates charged the New York Associated Press; that this was an embarrassing position for the telegraph company; that he had taken legal advice upon the subject, and that so far as he could see, the plaintiff's contract was not obligatory upon the company; that it was a *nudum pactum*. Then followed the submission of a proposition for an increased price for the transmission of matter between Washington and New York, and for improved facilities elsewhere, and an extension of territory. The plaintiff replied to the effect that he could

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not accept the doctor's views as to the contract; that he desired to carry on his business; that it was increasing and profitable, but that he would be willing to do anything that he could, without waiving the obligations of the contract, to meet their wishes in respect to the making of a supplementary contract, provided he could figure on an extension of territory. Doctor Green then replied that he would give the plaintiff plenty of time; that the company did not desire to act precipitately, but that he wished him to fully consider the subject. The next conversation, as he states, occurred in January, 1882, at which time the plaintiff asked for a schedule of prices paid by other associations, and what they proposed to charge him, in order that he might figure upon those prices and see whether he could afford to consent to pay them, and was informed by Dr. Green that he had received a further letter from the New York Associated Press taking a more peremptory position in regard to the matter, and that the matter of making an amicable arrangement had become more urgent than it seemed to be on the occasion of their first conversation. They again met on or about the first of February, and on that occasion the plaintiff was informed that the executive committee of the Western Union Company had decided to enforce uniform rates upon all press associations, charging all proprietors of press service and all press associations the same scale of prices for the same kind of business, and that the arrangement which he had at first proposed about the modification of the plaintiff's contract in respect to matter between Washington and New York could not be carried out. Thereupon the plaintiff protested and told Dr. Green that he should not consent to any modification of the contract; that he stood upon it and wished it carried out as it was written. Subsequently, and on the eleventh day of March, he received the following letter:

"WESTERN UNION TELEGRAPH COMPANY,

"NORVIN GREEN, *President*.

"NEW YORK, *March 11th*, 1882.

"JAMES H. GOODSSELL, Esq.:

"DEAR SIR—When the office of the Atlantic and Pacific Telegraph Company was closed a little more than a year ago,

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this company took over a press service for you to certain papers taking your news reports, which we have continued to perform at substantially the same rate it was being done for you by that company. As the rates for this service are absolutely below the cost to this company of performing it, to say nothing of remuneration for the using of its wires, and besides operating a great injustice to other press customers, I was directed some weeks ago by the proper committee of the board of directors of this company to notify you, which I did verbally, that the services cannot be continued unless a very material increase of compensation therefor was paid or secured to this company.

“On the twenty-fifth day of January our executive committee adopted a resolution that the same rates should be charged all patrons for press reports of like character and between the same places. Of this resolution you were informally advised and expressed your readiness to pay the same rate proportionately to the amount of service charged to other associations. You had previously and two months ago at least agreed with me verbally that you would pay the same rate for reports from Washington and drops thereof as was or should be paid by the New York Associated Press. These assurances, however, have not solved the whole question and slow progress has been made towards reaching a distinct understanding of what you shall pay. I am, therefore, directed by the said committee to whom this subject was referred, to say to you that from and after this date you will be charged for the transmission of your press reports the same rate as that charged for other combination press reports in the respective territories in which said reports are handled under existing agreements, and that unless such rate is paid or secured to be paid to this company the services will be discontinued.

“The committee feel that you cannot regard this a short notice since our free discussion of the subject for three months past has given you ample notice that it was our purpose and intention to increase the rates for your reports to that paid us by other customers for like service, and the committee feel

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that a decisive step in this direction has been already too long postponed.

Very respectfully yours,

“(Signed.)

NORVIN GREEN,

“*President.*”

Thereupon the plaintiff saw Dr. Green and informed him of the receipt of the letter and stated that he could not accept the proposition therein contained, that he should pay any substantial increase of price over that named in the contract; that the contract was binding on the company and himself; that he had carried it out and proposed to continue to carry it out in the future if possible. That thereupon Dr. Green replied stating that the contract could not be considered any longer; that he must then inform the plaintiff finally that the contract was repudiated by the company; that they would not perform any more services under the contract, but that if the plaintiff wished to carry on his business under a new contract in accordance with the terms and conditions outlined in the letter they would give him time to see what sort of an arrangement he could make with his customers, and to see whether he could pay the rates which they wished to charge. That thereafter and on the 24th day of March, 1882, the plaintiff received another letter from Dr. Green which contained a proposition for the transmission of his reports upon the new terms therein specified. Thereafter they again met and the plaintiff asked if that was the final action of the company. The doctor replied that it was. That he then told the doctor that he could not consent to accept the terms contained in the letter; that he was prepared to carry out the contract. The doctor replied that he had previously informed him that the contract had been repudiated by the company; that if it ever existed at all it had been abrogated; that he could not discuss with him that contract; that he was prepared to discuss with him the carrying on of the business under a new contract, the terms of which had been outlined in the letter of March twenty-fourth. Other conversations were testified to with other officers of the company of substantially the same import. It appears that

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Dr. Green gave the plaintiff time to communicate with his customers to enable him to see what arrangements he could make with them in reference to a continuance of the service. This the plaintiff did, but he was unable to make any arrangement with them under which he could accept the proposition outlined in the letters referred to. Thereupon and on the 20th day of June thereafter he notified the doctor that the papers taking his reports were unwilling to pay the increased price demanded, and he then delivered to the doctor a notice to the effect that he did not waive his claims under the contract; that he was ready and willing to carry it out, and demanded that it should be carried out on the part of the defendant. It further appears that the communication of the plaintiff with his customers asking for increased rates resulted in their calling a meeting in which his difficulties with the defendant were fully disclosed and discussed, and that thereupon his customers organized a corporation under the name of The United Press Association for the purpose of supplying their papers with the news of the day. The plaintiff thus finding himself deprived of his business, on the twenty-fourth day of June stopped the delivery of his reports to the defendant for transmission and thereafter transferred his business to the new company so organized for the sum of three thousand dollars.

It is now claimed that because the plaintiff discontinued his reports on the twenty-fourth day of June that he himself abandoned the contract, and is, therefore, not entitled to damages, but we are not willing to adopt this view. President Green, by his letter of March eleventh, as well as by his subsequent conversations with the plaintiff unqualifiedly repudiated the contract and notified the plaintiff that from that date he should be charged for his reports the increased prices demanded, and at no time afterwards did he recede from this position. He only gave the plaintiff time to communicate with his customers and see whether he could make arrangements for the payment of the rates demanded. When, therefore, he had failed to make new terms with his customers, by

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which he could accept the new proposition of President Green, and had notified him of such failure, the extension of time must be deemed at an end, and the position of the parties the same as if such extension had not been given. If the plaintiff on receipt of the letter of March eleventh, in which President Green notified him that the contract was repudiated by the company, and that thereafter he should be charged the increased prices for the matter transmitted, had stopped delivering to the company his reports for transmission, there could be no doubt but that the company would be held to have committed a breach of the contract, and the plaintiff justified in so treating it by stopping his reports. It appears to us that he must be regarded as occupying the same position after the expiration of the time given him to determine whether he could make new arrangements with the papers that had previously taken his reports.

Entertaining these views a discussion of the question arising out of the plaintiff's loss of business in consequence of the conduct of the defendant, as well as other questions upon which the referee has also found the defendant liable for a breach of the contract, does not appear to be necessary.

Questions involving the weight of evidence were properly considered in the General Term. This court can only review the exceptions. Exceptions to findings of fact are well taken if there is no evidence to sustain them. (Code of Civil Procedure, §§ 992, 993; *Healy v. Clark*, 120 N. Y. 642.)

Many of the facts were found upon a conflict in the evidence. In our review we have only called attention to that portion of the evidence which tends to sustain the findings.

We do not understand that it is claimed that the allowance of thirty thousand dollars as damages for such breach is unreasonable or excessive.

The judgment should be affirmed, with costs to the plaintiff.
All concur.

Judgment affirmed.

Statement of case.

MARY CULROSS, Appellant, v. ARTHUR J. GIBBONS et al.,
Respondents.

The rule of *res adjudicata* applies to all judicial determinations, whether made in actions or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination.

An order, therefore, made upon petition authorized by statute, is conclusive as between the parties before the court, and can only be reviewed upon appeal.

In an action to have a trust canceled and to compel defendant G., the trustee, to reconvey the trust estate to plaintiff from whom he received the conveyance, it appeared that pursuant to a petition presented by G., all the parties to the action the persons interested in the trust estate consenting, an order was granted declaring the allegations in the petition to be true, settling the accounts of G. as trustee, removing and relieving him from the trust, and directing that he should not further interfere with the trust estate. In said petition G. set forth the original declaration of trust and the fact that he had purchased certain real estate, taking title in his own name, paying part of the consideration from the surplus income of the trust estate and securing the remainder by mortgages on the property, and that on the same day he executed an instrument purporting to enlarge the trust so as to include such property, which instrument was also executed by plaintiff and those interested in the trust. The original declaration of trust provided for the collection of the rents and profits of the real estate and the application of the net proceeds for the maintenance of plaintiff during her life, after her death to that of her husband during his life, and after the deaths of both to divide the property or its avails among her children, with power in the trustee to mortgage or dispose of the property, if it should appear to be for the benefit of the trust. *Held*, that the trust first mentioned being valid, it was immaterial whether the others were valid as trusts or as powers in trust, as they were separable from the valid trust, and this could be upheld without conflicting with the intention of the creator of the trust.

On the same day the order was granted, on application of plaintiff another trustee was appointed of all the real estate, with the powers and duties contained in the last declaration of trust. G. was allowed, in his accounts, the amount so paid by him for the property purchased. *Held*, that the orders so made on the application of G. were conclusive upon the parties; that it necessarily determined the question as to whether G. should retain the title, and also that the property so purchased by him was held in trust, and while the order remained in force an action was not sustainable to procure a different determination as to the questions involved therein.

(Argued December 15, 1891; decided January 20, 1892.)

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j164	222

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Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which affirmed a judgment entered upon the report of a referee dismissing plaintiff's complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Eugene Van Voorhis for appellant. If any valid trust was created, it was created by the plaintiff. (3 R. S. 2189, § 75.) The deed from the plaintiff to the defendant Gibbons, and the declaration of trust by the latter should be set aside and canceled, and the said defendant be directed to reconvey the property to the plaintiff. (*Everitt v. Everitt*, L. R. [10 Eq.] 405; *Wallaston v. Tribe*, 9 id. 44; *Coutts v. Acworth*, 8 id. 558; *Prideaux v. Lonsdale*, 1 DeG., J. & S. 433; *Hall v. Hall*, L. R. [14 Eq.] 365; L. R. [8 Ch. App.] 430; *Forshaw v. Wilsby*, 30 Beav. 243; *Hugin v. Bosely*, L. C. Eq. 406; *Coak v. Lamont*, 15 Beav. 241; *Sharpe v. Leake*, 31 id. 491; *Philipson v. Cary*, 32 id. 628; Perry on Trusts, § 104; 2 Pom. Eq. Juris. § 986; *Conkling v. Davies*, 14 Abb. [N. C.] 499; *Gibbs v. N. Y. L. Ins. Co.*, Id. 1; *Billage v. Southee*, 9 Hare, 534; *Houghtaling v. Lloyd*, 21 Civ. Pro. Rep. 56.) Defendant Gibbons has no right to retain the title to this trust estate after he had been discharged as trustee, and a new trustee appointed. (3 R. S. 2182, §§ 58, 59, 60, 75; *Farrar v. McCue*, 89 N. Y. 144; *Delaney v. McCormick*, 88 id. 174; Lewin on Trusts, 608, 609; *Cole v. Wade*, 15 Ves. 27; *Herrman v. Robertson*, 64 N. Y. 342; *Hetzel v. Barber*, 69 id. 1; *Heermans v. Burt*, 78 id. 259; *Townsend v. Frommer*, 125 id. 446; *Betts v. Betts*, 4 Abb. [N. C.] 317.) The plaintiff is in any case entitled to a deed of the Ambrose street property. This property was not included in the original trust, but was purchased long after in the year 1884, with funds belonging to the plaintiff. (Pom. Eq. Juris. § 997.) The referee erroneously found as a legal conclusion that the plaintiff is precluded from questioning the validity and effect of the trust respecting the Ambrose street property by the

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final order discharging Gibbons from his trust. (Freeman on Judg. § 258; Bigelow on Est. [4th ed.] 153, 669; *Williams v. Williams*, 46 Wis. 469; *Ontram v. Morewood*, 3 East, 346; *Jackson v. Wood*, 3 Wend. 27.)

George F. Yeoman for respondents. This court will not disturb the findings of fact made by the referee. (*Baird v. Mayor, etc.*, 96 N. Y. 576; *Sherwood v. Hauser*, 94 id. 626; *People v. Stock Brokers*, 92 id. 98; *Rogers v. Smith*, 47 id. 324; *Finch v. Finch*, 15 Ves. 50.) The plaintiff is estopped from attacking either trust. The fact of the validity of the trust is *res adjudicata*. (*People v. Barnes*, 114 N. Y. 317; Whart. on Ev. [3d ed.] §§ 758, 783; Freeman on Judg. § 325; *In re Livingston*, 34 N. Y. 577; *Onondaga v. Briggs*, 2 Den. 33; *Leavitt v. Alcott*, 95 N. Y. 212-221, 222; Bigelow on Est. [2d ed.] 17; *Wood v. Mather*, 38 Barb. 474.) The trusts are of the character authorized by law. (*Darling v. Rogers*, 22 Wend. 483; *Downing v. Marshall*, 23 N. Y. 380; *Manice v. Manice*, 43 id. 364; *Craig v. Craig*, 3 Barb. Ch. 103; *Dominick v. Sayer*, 3 Sandf. 555; *Belmont v. O'Brien*, 12 N. Y. 394; *McLean v. McDonald*, 2 Barb. 534; Willard on Real Estate, 233; Girard on Real Prop. [3d ed.] 252, 253; *Adams v. Perry*, 43 N. Y. 487; *In re Livingston*, 34 id. 555; *Hoxie v. Hoxie*, 7 Paige, 187; *Knight v. Weatherwax*, Id. 182; *Mott v. Ackerman*, 92 N. Y. 539; *Hawley v. James*, 5 Paige, 444; *Roosevelt v. Roosevelt*, 6 Hun, 31; Willard on Real Prop. 525.) The trusts were properly created. (Pom. Eq. Juris. §§ 996, 1001; Perry on Trusts, §§ 82, 98; Girard on Titles [3d ed.] 255, 328; 1 Perry on Trusts, §§ 104, 109.)

PARKER, J. By this suit in equity, it was sought to compel the defendant Arthur J. Gibbons, to convey to the plaintiff certain real estate, the legal estate of which was vested in him under the following circumstances:

Prior to the 13th of December, 1876, James R. Culross, the husband of the plaintiff, was the owner of the major portion of such real estate, and by deed of that date, in which his wife joined, he quit-claimed it to Thomas P. O'Kelley, an

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attorney at law ; O'Kelley quit-claimed the same premises to the plaintiff by deed dated the fourteenth of the same month ; the plaintiff, by deed of the same date, quit-claimed such premises to the defendant Arthur J. Gibbons ; and Gibbons executed an instrument in writing, bearing date the fifteenth of the same month, in which it was declared that he held said premises upon certain trusts therein expressed.

These several instruments were drafted by O'Kelley ; subscribed at his office ; acknowledged on the 15th day of December, 1876 ; and recorded in the proper county clerk's office at the same minute of time. At the time of the execution of these instruments, James R. Culross had a family, consisting of his wife and several children, among whom was his daughter Minnie, then as now the wife of the defendant Gibbons.

Culross had become so irregular in his habits as to excite apprehension in the minds of several of the members of his family that he might squander his property, which was then of the value of about \$40,000. These apprehensions were made known to Mr. Culross, to whom a wish was also expressed, that he make some disposition of his property to the end that it might be saved from waste. He readily acquiesced in the suggestion, and the result was the execution of the instruments already referred to.

In the declaration executed by Gibbons it was declared that he held the premises in trust, the terms of which may be briefly stated, as follows. (1) To collect the rents and profits of the real estate, and after payment of taxes, insurance and other liens, apply the balance to the support and maintenance of the plaintiff during her life. (2) In the event of her death before that of her husband, to apply such balance for his benefit during life. (3) After their deaths, and after paying all liens, and incumbrances on the property to divide the premises or the avails thereof within eighteen months, equally between their children ; the descendants of any deceased child to take his or her share. (4) Reserving to the trustee power to mortgage or otherwise dispose of the premises for the benefit of the trust.

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Immediately after the execution of the instrument drawn by O'Kelley, Gibbons took charge of the real estate and cared for the financial affairs of the business in which Mr. Culross was engaged.

September 1, 1884, Gibbons purchased certain real estate on Ambrose street, in the city of Rochester, paying a part of the consideration from the surplus income and executing mortgages upon such property for the remainder. The title he took in his own name, and on the same day executed an instrument in writing purporting to enlarge the trust created December 15, 1876, so as to bring such property within it, and this instrument was also executed by the plaintiff, and each of her children, except David J. Culross. Thereafter Gibbons managed the Ambrose street property, as he did the property first conveyed to him.

Subsequently and on the 8th of June, 1887, pursuant to a petition presented by Gibbons, all the parties to this action, and the sons of the plaintiff (who have since assigned their interests to her) consenting, the court made an order declaring the allegations in the petition to be true; settling his accounts as trustee; removing him and relieving him from the trusts, and directing that he should not interfere further with the same, or either of them. On the same day, and on the application of the plaintiff, the court by an order duly made, appointed Alexander B. Crooks "trustee of all the real estate described in said petition, with all the powers and duties contained in a certain declaration of trusts, dated on the 15th day of December, 1876."

It will be observed that as a result of the orders of June eighth, Crooks became trustee in the place of Gibbons, removed, but the legal estate remained in him, and he was enjoined from further interference.

As we have already remarked, the plaintiff seeks to have any trust that may have been created, canceled, and the property restored to her. She assigns in support of her position the following grounds: (1) That the deed from her to Gibbons was fraudulently procured. (2) If it be otherwise determined,

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then that the trusts sought to be created are invalid. (3) If valid, then the trusts having been created by the plaintiff, and being voluntary, may be revoked because the grantor did not understand that she was putting the property beyond her control.

Her contention, with reference to the Ambrose street property purchased subsequently, rests on somewhat different grounds, and will be considered later.

As to the first ground, it is sufficient to say that the learned referee found as a fact that the plaintiff acted understandingly and freely, and that no fraud, deception, undue influence or abuse of confidence was practiced upon her.

As to the second ground it is apparent that an attempt was made to create a trust, providing for the collection of the rents and profits of the real estate, and their application in payment of insurance, taxes and other charges on the property, and to use the remainder in the support and maintenance of the plaintiff during her life, and for the benefit of her husband after her death. (2) To divide the premises or the avails thereof among the issue of plaintiff after her death and that of her husband. (3) To mortgage the property or dispose of it if it should appear to be for the benefit of the trust.

The trust first mentioned is conceded to be valid, and whether the other two attempted trusts, while invalid as trusts may be valid as powers in trust, and employed as aids to the execution of the valid trusts, as contended by one side and denied by the other, need not be considered, for they are so easily separable from the valid trust that it may be upheld without doing injustice to the intention of the creator of the trust.

Indeed it would be in furtherance of the trust maker's general scheme to do so, should the latter two be held illegal, and the court would so decree. (*Underwood v. Curtis*, 127 N. Y. 523.)

The third ground is based on the assumption that the plaintiff was the creator of the trusts, and if that assumption could be allowed the appellant would in this court be confronted

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with the difficulty that the record contains a finding of fact controlling here that the plaintiff acted understandingly.

But the learned referee was of the opinion, and he found the fact to be, that the several instruments by which the transfer of title was effected, including the declaration of trust, were drawn pursuant to the direction of James R. Culross, and were intended by the several parties thereto as one transaction, for the purpose of transferring the title from Culross to Gibbons in trust, O'Kelley and the plaintiff being mere instruments of conveyance. The reasoning of the learned referee in support of the conclusion reached, is satisfactory, and so fully presented in his opinion as to render further discussion on that point wholly unnecessary.

There is yet another ground which requires an affirmance of the judgment dismissing the complaint, and it is alike applicable to the original transaction, and to the matter of the Ambrose street premises, which the plaintiff contends was purchased with the income belonging to her, and, therefore, equitably her property.

By statute, it is provided that, "upon the petition of any trustee, the Court of Chancery may accept his resignation and discharge him from the trust, under such regulations as shall be established by the court for that purpose, and upon such terms as the rights and interests of the persons interested in the execution of the trust may require." (Birdseye's Statutes, vol. 3, page 3180, § 25.)

An order made upon petition authorized by statute, is conclusive as to the parties before the court, and can only be reviewed upon appeal. (*In re Livingston's Petition*, 34 N. Y. 555.)

Under this statute, the court had power to pass the accounts of the trustee, and to impose such terms as the interests of the parties required, as a condition of relieving the trustee from a further execution of the trust.

Necessarily, it could have required him to convey the real estate to the newly-appointed trustee, if it was deemed for the best interest of the parties that it should be done.

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It is a well-established rule that where a matter has been submitted to an authorized judicial tribunal, its decision thereon is final between the parties, until it has been reversed, set aside or vacated; and the rule of *res adjudicata* applies to all judicial determinations, whether made in actions, or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination. (*People ex rel. v. Barnes*, 114 N. Y. 317; *Leavitt v. Wolcott*, 95 id. 212; *People ex rel. v. Hall*, 80 id. 117; *Demarest v. Darg*, 32 id. 281; *Sibley v. Waffle*, 16 id. 180; *Supervisors v. Briggs*, 2 Denio, 33.)

Gibbons, in his petition to the court, praying that his accounts be settled and adjusted, and he be relieved from the further execution of the trust, alleged the original declaration of trust, and its provisions; the subsequent purchase of the Ambrose street property, and its terms; the enlargement of the original trust so as to include that property, and an account of his receipts and disbursements as such trustee.

Every person interested in the estate, including the plaintiff, were made parties to that proceeding. They all appeared and consented to the order made, which determined the allegations in the petition to be true; passed the accounts of the trustee as stated by him; relieved him from the trusts and each of them, and directed him "not to interfere further with the same or either of them." The order thus made was necessarily a determination that Gibbons held the Ambrose street property, as well as the other real estate, in trust, and he was allowed in his accounts what he had paid for it, out of the income of the property.

On the making of this order, the occasion was properly presented for determining whether Gibbons should retain title to the real estate, or convey it to his successor, who was appointed on the same day. And the provision directing Gibbons "not to interfere further with said trust," indicates that it was a subject of consideration, otherwise such direction was without a purpose.

If that question was not raised or passed on, the proper

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practice was to present a petition to the court, as in that proceeding, for a modification of the order. But, while the order stands unreversed, actions cannot be brought by the several parties interested, to procure determinations to which they may deem themselves entitled, as to matters which should have been, and may have been, passed upon.

The judgment should be affirmed.

All concur.

Judgment affirmed. •

THE PEOPLE OF THE STATE OF NEW YORK, Respondents, v.
STANLEY H. LOWNDES, Appellant.

Under the provision of the Penal Code (§ 441), declaring that a non-resident who "plants oysters in the waters of this state, without the consent of the owner of the same, or of the shore, or gathers oysters * * * in any such waters on his own account or for his own benefit or the benefit of a non-resident employer," shall be guilty of a misdemeanor, the concluding clause beginning "on his own account," applies alike to each of the two offenses created by the act, *i. e.*, to the planting as well as the gathering of oysters.

Where an indictment under said provision charged that defendant at a time specified, he then being a non-resident, planted oysters in waters of the state without the consent of the owners, but omitted to aver that this was done for his own benefit or the benefit of a non-resident employer, *held*, that the indictment failed to state facts constituting an offense; and that a demurrer thereto on that ground was improperly overruled.

It seems the legislature has power to discriminate between residents and non-residents in favor of the former, in regard to its waters, the common property of the people of the state.

People v. Lowndes (55 Hun, 469), reversed.

(Argued December 17, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 10, 1890, which affirmed a judgment entered upon a verdict of the Court of Sessions of the county of Suffolk, convicting the defendant of a misdemeanor in violating the provisions of section 441 of the Penal Code.

The facts, so far as material, are stated in the opinion.

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James C. Carter for appellant. Huntington bay is an inseparable part of Long Island sound, and is, therefore, outside of the boundaries of the patent to the town. (*Robbins v. Ackerly*, 91 N. Y. 98.) The effort of the prosecution to prove title by the cession of 1888 was wholly ineffectual. (Laws of 1888, chaps. 279, 494; *Charles River Bridge v. Warren Bridge*, 11 Pet. 421; *Martin v. Waddell*, 16 id. 369; *Rice v. R. R. Co.*, 1 Black, 359; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Lansing v. Smith*, 4 Wend. 9; *Chenango Bridge v. Binghampton Bridge*, 27 N. Y. 87; 3 Wall. 51.) The words in the statute, "waters of this state," are to be interpreted not as meaning only waters belonging to this state, if indeed they are to be taken as including such waters, but as embracing waters of this state belonging to persons or corporations other than the state. (*McCready v. Virginia*, 94 U. S. 391.) The indictment is framed upon the assumption that the qualifying words "on his own account, or for his own benefit, or for the benefit of a non-resident employer," are attached only to the second offense created by the act, namely, "the gathering of oysters from their beds of natural growth," and not the first, namely, that of planting oysters. This interpretation is plainly erroneous. (Const. art. 4, § 2; *Corfield v. Coryell*, 4 Wash. [C. C.] 371; *Slaughter House Cases*, 16 Wall. 37; *U. S. v. Cruikshank*, 92 U. S. 542, 557; *U. S. v. Carll*, 105 id. 611; *Eckhardt v. People*, 83 N. Y. 462; *People v. Allen*, 5 Den. 76; *People v. Gates*, 13 Wend. 311; *People v. Clements*, 42 Hun, 353; 107 N. Y. 205; *People v. Monteverde*, 43 Hun, 447.) The statute in question is a part of the criminal law of the state, founded upon the policy of repressing willful trespasses, and applicable only to such cases. (*People v. Stevens*, 109 N. Y. 159.) The whole of section 441 of the Penal Code, and every part of it, upon the interpretation of the prosecution, is invalid as a violation of the Federal Constitution. (Const. U. S. art. 4, § 2; *Slaughter House Cases*, 16 Wall. 77; *Paul v. Virginia*, 8 id. 180; *Santa Clara Co. v. Southern Pac. Co.*, 118 U. S. 384; *In re Parrott*, 1 Fed. Rep. 481; *In re Ah Chong*, 2 id. 733.)

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Martin J. Keough for appellant. The indictment does not state facts sufficient to constitute a crime. (Penal Code, § 441; *People v. Clements*, 42 Hun, 353; *People v. Monteverde*, 43 id. 447; *People v. Gates*, 13 Wend. 311; *People v. Miller*, 2 Park. Crim. Rep. 187.) Under this indictment for planting oysters in the waters of this state without the consent of the owner of the same, the intent is a material element of the offense, and the court erred in excluding evidence that he planted the oysters under a *bona fide* claim of right, which he might have reasonably believed entitled him to do so. (*People v. Stevens*, 109 N. Y. 159; *Bayliss v. Cockroft*, 81 id. 363; *McKown v. Hunter*, 30 id. 625; *Thurston v. Cornell*, 38 id. 281; *Bedell v. Chase*, 34 id. 386.) The court below erred in refusing to charge as requested, that if the jury have any reasonable doubt as to whether this land (the *locus in quo* where the planting was done) is within or without the patent, they must give the defendant the benefit of the doubt and acquit, and also in charging that if the jury believe Huntington bay is within the patent limits of the town of Huntington, defendant has shown no defense. (*Robbins v. Ackerly*, 91 N. Y. 98; *Brookhaven v. Strong*, 60 id. 56; Laws of 1888, chap. 279.) The court erred in refusing to charge that if the defendant and those under whom he claimed had the exclusive use and occupation of these grounds for upwards of twenty years, that they kept them distinctly staked out; that no natural oysters were growing upon them; that they used them in hostility to the claim of the town and all other persons; that then, in July, 1888, the defendant, and those under whom he claimed, had a prescriptive right to the use of the ground, and were entitled thereto. (*McCarty v. Holeman*, 10 Wkly. Dig. 501; *Decker v. Fisher*, 4 Barb. 492; *Lowndes v. Dickerson*, 34 id. 586.)

Charles R. Street for respondent. The colonial grants to the trustees of the town of Huntington were valid grants, and vested title in them, including lands under tide water and an exclusive fishery therein. (1 R. S. [8th ed.] 44, 58, 64, 84, 879, 881,

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885, 900, 1039; *Brookhaven v. Strong*, 60 N. Y. 72.) The colonial grants take in the premises where the oysters were planted. (*Rogers v. Jones*, 1 Wend. 238; *Brookhaven v. Strong*, 60 N. Y. 72; *Hand v. Newton*, 92 id. 89; *Robbins v. Ackerly*, 91 id. 98; *Town of Hempstead v. Thompson*, 115 id. 635; *Town of Huntington v. Lowndes*, 40 Fed. Rep. 565.) John H. Lowndes, the employer of the defendant, acquired no title to the premises by adverse possession. (Code Civ. Pro. § 362; *Ogden v. Jennings*, 66 Barb. 308; *Colvin v. Burnett*, 17 Wend. 564; *Howard v. Howard*, 17 Barb. 663; *Livingston v. P. I. Co.*, 9 Wend. 511; *Robinson v. Kime*, 70 N. Y. 152; *Bliss v. Johnson*, 94 id. 235; *Smith v. Burtis*, 9 Johns. 174, 180; *Jackson v. Johnson*, 5 Cow. 74; *Jackson v. Frost*, Id. 346; *Hoyt v. Dillon*, 19 Barb. 651; *Doe v. Thompson*, 5 Cow. 371; *Thomson v. Burhans*, 9 Hun, 1; 79 N. Y. 99; *Higenbotham v. Stoddard*, 72 id. 94.) Neither defendant nor his father John H. Lowndes acquired any easement in the premises. (*Ward v. Warren*, 82 N. Y. 265; *Nichols v. Wentworth*, 100 id. 455; *Munson v. Reid*, 46 Hun, 399; *Thomas v. Marsfield*, 13 Pick. 240; *Kellogg v. Thomson*, 66 N. Y. 88; *Burbank v. Fay*, 65 id. 57; *Thayer v. N. B. R. R. Co.*, 125 Mass. 253; *Dodge v. McClintock*, 47 N. H. 387; *Polly v. McCall*, 37 Ala. 20; *Slater v. Jepherson*, 6 Cush. 129; *Parker v. Parker*, 1 Allen, 245; *Colvin v. Hollis*, 3 Met. 128; *Wheeler v. Spinola*, 54 N. Y. 387; *Roberts v. Baumgarten*, 19 J. & S. 482; *Parker v. Wallis*, 60 Md. 15; *Townsend v. Rieves*, 44 N. J. L. 525; *Brookhaven v. Strong*, 60 N. Y. 72; *Robbins v. Ackerley*, 91 id. 98.) The legal title to Huntington bay being in the trustees of the town, for the benefit of the inhabitants, under its colonial grants, and they having an exclusive right of fishery therein, any resident of the town might go upon the waters and take floating fish or shell fish of natural growth, but even a resident of the town could not reduce to his exclusive possession a particular part of the common lands and exclude all other residents from its enjoyment without the consent of the trustees. Such a person would acquire no rights as against the trustees by such occupation.

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(*People v. M. B. R. R. Co.*, 84 N. Y. 568; Laws of 1788, chap. 64, §§ 15, 16; 2 R. S. [8th ed.] 877.) If the premises are not within the limits of the colonial grants to the town of Huntington, they belonged to the state of New York at the date of the Ceding Act, in 1888. (*Polard v. Hagan*, 3 How. Pr. 212; *Wilber v. Harbor*, 18 Wall. 57; *Goodlittle v. Kibbe*, 9 How. Pr. 471; *Doe v. Beebe*, 13 id. 25; *McCready v. Virginia*, 94 U. S. 391; Laws of 1880, chap. 213.) The Ceding Act, relied on by defendant, furnishes no defense. (*Fleet v. Hegeman*, 14 Wend. 41; *Post v. Kriesher*, 16 Abb. [N. C.] 38.) The non-residence of the defendant and of John H. Lowndes, under whom he claims the right to plant, is fatal to the defense. (*Smith v. State of Maryland*, 18 How. [U. S.] 71; *McCready v. State of Virginia*, 94 U. S. 391; Laws of 1817, chap. 211; Laws of 1887, chap. 584, §§ 4, 9; Laws of 1849, chap. 194, § 4; Laws of 1875, chap. 482, § 1; Const. N. Y. art. 3, § 23.) The defendant's claim that the statute states no crime, is erroneous. (Laws of 1859, chap. 468; Laws of 1880, chap. 453; Laws of 1863, chap. 493, § 1; Laws of 1865, chap. 343; Laws of 1866, chap. 306, § 1, 404; Laws of 1870, chap. 234; Laws of 1871, chap. 639; Laws of 1872, chap. 667; *McCready v. State of Virginia*, 94 U. S. 391.) The indictment states facts sufficient to constitute an offense against the criminal law. (Penal Code, §§ 385, 441; Code Crim. Pro. §§ 283-286, 542; *Pontius v. People*, 82 N. Y. 339; *People v. Conroy*, 97 id. 62; *People v. King*, 110 id. 418.) The question of the intent of the defendant to commit a crime was properly excluded. (*People v. Kibler*, 106 N. Y. 321; *People v. Schaeffer*, 41 Hun, 25; *People v. Mahaney*, Id. 28; *United States v. Adams*, 2 Dak. 309.) Section 441 of the Penal Code of this state is not unconstitutional under article 4, section 2, of the Federal Constitution. (Gould on Waters, chap. 1, 2; *Cornfield v. Coryell*, 4 Wash. C. C. 371; *Smith v. Maryland*, 18 How. [U. S.] 71; *McCready v. Virginia*, 94 U. S. 391; *Manchester v. Massachusetts*, 139 id. 259, 260; *Sherlock v. Alling*, 93 U. S. 99; *Brookhaven v. Strong*, 60 N. Y.

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56; *Robbins v. Ackerly*, 91 id. 98; *Town of Huntington v. Lowndes*, 40 Fed. Rep. 565; *Rogers v. Jones*, 1 Wend. 251; *People v. Lemmon*, 20 N. Y. 562; *Hallick v. Dominy*, 69 id. 238; 34 N. J. L. 532; *Borden v. Crocker*, 10 Pick. 383; *Paul v. Hazelton*, 37 N. J. L. 106, 163; *Nickerson v. Bracket*, 10 Mass. 213; *Russell v. Russell*, 15 Gray, 161; *Weston v. Sampson*, 8 Cush. 347; 25 Gratt, 786; *Averill v. Hull*, 37 Conn. 321; *Gullup v. Tracy*, 25 id. 10; 110 U. S. 421; 9 Wheat. 1; 1 id. 304; 12 Pet. 657; 4 Wheat. 121; *Delaney v. Britt*, 51 N. Y. 78; *People v. Hazen*, 121 id. 313.)

BRADLEY, J. . The purpose of the indictment against the defendant was to charge him with the violation of the statute, which provides that "a person who, not being at the time an actual inhabitant or resident of this state, plants oysters in the waters of this state, without the consent of the owner of the same, or of the shore, or gathers oysters or other shell-fish from their beds of natural growth, in any such waters on his own account, or for his own benefit, or the benefit of a non-resident employer, is guilty of a misdemeanor, punishable by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars, or both." And the indictment was that "the said Stanley H. Lowndes, then not being an actual inhabitant and resident of the state of New York, at the town of Huntington in the county of Suffolk aforesaid, on the 14th day of July, 1888, willfully and wrongfully planted oysters in the waters of Huntington bay in said town and county without the consent of the owners of the same, to wit: The board of trustees of the town of Huntington, against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity." The defendant demurred to the indictment on the ground that it failed to state facts sufficient to constitute an offense against the criminal law. The demurrer was overruled and exception taken. The defendant thereupon entered his plea of not guilty. And the trial resulted in his conviction.

It appeared by the evidence that in July, 1888, the defend-

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ant was engaged in planting oysters in Huntington bay ; that he was then a resident of the state of Connecticut ; and that he was doing this work as the employe of his father John Lowndes, also a resident of that state, who twenty years before had staked out the grounds and buoyed them off at the place in question in the bay, and thereafter had been engaged in planting natural oysters and gathering the cultivated oysters there.

In the view of the trial court the only question of fact was whether the place where the oysters were planted by the defendant was within the town of Huntington ; and that was dependent upon the northern boundary of the royal patent from the crown made by Richard Nicholls, governor-general, etc., November 30, 1666, to the freeholders and inhabitants of the town of Huntington, confirmed by the charter of Thomas Dongan, captain-general and governor-in-chief of New York, etc., August 2, 1688, and by Benjamin Fletcher, captain-general and governor-in-chief, etc., October 5, 1694. Those colonial patents or grants bounded the land embraced within them on the north by the sound, that is what is known as Long Island sound. The bay was an open one widening to the north ; and it is claimed on the part of the defense that the bay is within the sound ; and that the determination by the court that Northport bay was within the limits of the royal patent has no essential application here because that was a landlocked harbor. (*Brookhaven v. Strong*, 60 N. Y. 72 ; *Robins v. Ackerly*, 91 id. 98.) If the *locus in quo* was not within the colonial patent or grant it was the property of the state, and passed to the trustees of the town of Huntington by the legislative act of cession of May, preceding the time of the alleged offense. (L. 1888, ch. 279.) The view taken of the case renders it unnecessary to consider the question of the northern boundary of the premises embraced in the patent, or the effect upon the rights of John Lowndes of the act of cession of 1888. Nor is it necessary to inquire whether any other question of fact bearing upon the intent of the defendant should have been submitted to the jury as urged by the defend-

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ant's counsel. The case may be disposed of upon the exception taken to the ruling upon the demurrer.

The statute was passed with the view to discrimination between those persons who were and those who were not residents of the state, and in favor of the former to the exclusion of the latter for the purpose of planting and gathering oysters in its waters. This, to that extent, is a lawful exercise of legislative power over the common property of the citizens of the state. (*McCready v. Virginia*, 94 U. S. 391.)

The statute created two offenses. One for planting oysters in the waters of the state, and the other for gathering oysters and other shell-fish from their natural beds in any such waters. The words without the consent of the owner of the same, or of the shore, include the owners, whoever they may be, and are applied to the person planting who is not then an actual inhabitant or resident of the state. If this is all that is essential to the offense and all that is made requisite by the statute the indictment was sufficient.

But it is quite evident that such is not the construction intended, or to which the statute is entitled. The subsequent words, "on his own account or for his own benefit, or the benefit of a non-resident employer," are applicable alike to both offenses. It may be that a different legislative intent may have been applied to the interpretation of the section, if reference to a person not being an inhabitant and resident of the state had by express repetition been made applicable to the offense of gathering oysters, etc.; but the words "on his own account," etc., relate back to the person first and only mentioned at the opening of the section. And while those words are more closely in position connected with the statement of the second offense than with the other, it seems clear that they were intended to be attached and made essential to the offense first mentioned in the section. It is quite difficult to see that it was intended to so discriminate between the offenses as not to make that of gathering oysters from their natural beds a criminal offense unless done by a non-resident on his own account or for his own benefit, or the benefit of a

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non-resident employer, and not to make those conditions requisite to the offense of planting oysters. The other view of the provisions of the section and that upon which the indictment was framed, might lead to the inquiry whether the provisions purporting to create the offense of planting contain all the requisites of a criminal offense. They certainly might be construed to impute a crime to a person not chargeable with the offense. The owner mentioned in the statute refers to the owner of the waters of the state, and this means waters within the state by whomsoever owned. A person not having the title may have the right to plant oysters in such waters. He may take it by license; and he may employ a person not an inhabitant and resident of this state to plant oysters there. And the privilege of a citizen of any one of the United States, no less than that of a citizen of this state, to accept lawful employment and perform service within it, has the constitutional guaranty that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." (U. S. Const. art. 4, § 2; *Slaughter House Cases*, 16 Wall, 77.)

But the construction given to the statute in question renders it unnecessary to pursue further the subject of constitutional guaranty, or to seek to apply it to the present case. And as an essential element of the statutory offense of planting oysters by a non-resident, is that it be done on account or for the benefit of the person doing it, or for the benefit of a non-resident employer; the failure to charge that fact in the indictment was a substantial omission. And the rule which requires for its support when challenged, that all ingredients essential to the offense be alleged, renders the indictment fatally defective. (*People v. Gates*, 13 Wend. 311; *People v. Allen*, 5 Denio, 76; *Eckhardt v. People*, 83 N. Y. 462; *U. S. v. Carll*, 105 U. S. 611.)

While the words used in a statute to define a crime need not be strictly pursued in the indictment, words conveying the meaning of those employed by the statute to express the ingredients of the offense may be used. (Code Cr. Pro. § 283.)

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Imperfections in matter of form may be disregarded (*Id.* § 285), but the substance of all that is requisite to the offense must be alleged. (*Pontius v. People*, 82 N. Y. 339; *People v. King*, 110 *id.* 418; *People v. Clements*, 107 *id.* 205.)

The question here is not one of form or particularity of statement of the matters essential to the crime, but of entire failure to allege them in any manner. It is urged that because the two offenses mentioned in section 441 of the Penal Code had separate sources in prior statutes (Laws 1866, chap. 404, § 6; Laws 1879, chap. 87), the provisions should have the construction that they were there severally entitled to. But it may be observed that the provisions of that section of the Laws of 1866, embracing both of the offenses, materially differ in structure from those in the statute under consideration. And the other prior statute referred to, amendatory of Laws 1878 (Chap. 302), had relation only to raking or gathering of oysters and other shell fish by non-residents of the state on their own account and for their own benefit, or on account or for the benefit of non-resident employers, and was not confined to taking them from their beds of natural growth. That statute could not have been effectual to deny to the owner, although a non-resident, the right of taking his oysters from the waters of the state, if he owned any which he had planted there. (*People v. Hazen*, 121 N. Y. 313.) In the case last cited the constitutional question raised was not considered, nor was it necessary to do so for the purposes of the result reached. We fail to find anything in the prior statutes before mentioned to legitimately indicate a legislative intent in support of the construction of the present statute contended for on the part of the prosecution. And the view here taken of its construction leads to the conclusion that the judgment should be reversed and the defendant discharged.

All concur.

Judgment reversed.

Statement of case.

JOSEPH GRAFTON, Appellant, v. WILLIAM MOIR, Respondent.

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A right of way, which is reserved, but not specifically defined in a conveyance, need only be such as is reasonably necessary and convenient for the purpose for which it was created.

In an action to restrain defendant from obstructing an alley-way, the following facts appeared: D., who owned a parcel of land on the corner of two streets in New York city, built thereon four houses fronting on one of the streets, with a stable in the rear of each, leaving an alley-way which afforded access from the side street to the stables. D. subsequently conveyed the corner lot to defendant, reserving "the right of way through and over the carriage or alley-way" to the three stables on the other lots "as long as the said three stables shall be occupied as private stables." The third lot was conveyed to plaintiff. Defendant built over the alley-way a brick building, resting on iron girders, supported by walls on either side. The trial court found that the carriage-way was left as convenient, in regard to breadth, for egress and ingress of vehicles as it was before the changes were made; that it did not appear that such egress and ingress had been in any respect interfered with or rendered less commodious, and that the alley, as it now exists, has sufficient light and air for all purposes of egress and ingress. The complaint was dismissed. *Held*, no error; that defendant's deed vested in him all the rights of absolute ownership, except as restricted by the reservation; that, under the reservation, plaintiff had no right to claim that the whole alley-way should be left open for his use, or to furnish light and air to his stable, but only so much thereof as would afford convenient access to his stable in the usual way, and as would furnish light and air needed for the reasonable enjoyment of the way.

Brooks v. Reynolds (106 Mass. 31), distinguished.

(Argued December 17, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 22, 1889, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the defendant from obstructing an alley-way, over which the plaintiff claimed a right to pass in order to reach his stable.

Statement of case.

In 1852, one Davis owned a parcel of land on the corner of Fifth avenue and Thirty-first street in the city of New York, with a frontage of about 112 feet on the former and 150 feet on the latter. After subdividing said parcel into four lots, substantially equal in size, fronting on the avenue, he erected a house and stable on each and laid out an alley-way about eighteen feet wide, extending from Thirty-first street across the rear of the property so as to afford access to the stables. Thereafter, and on June 1, 1852, he conveyed the corner lot, reserving a right of way over the alley to the stables on the other three lots, and subsequently it was conveyed to the defendant with the same reservation. After this conveyance had been recorded, and on December 31, 1852, said Davis conveyed the third lot from the corner, with a right of way over the alley, and subsequently the same was conveyed to the plaintiff. The stables fronting on the alley were each twenty-six feet in front by twenty-two feet in depth, with a cellar, main floor and hay-loft. In front of each was a brick vault about three feet wide, covered by a grating and next to each vault was an uncovered and unprotected inclined plane or roadway, extending a little more than three feet from the stable wall out into the alley and descending into the cellar. The alley was paved, and was closed on Thirty-first street by an iron gate, fastened to stone posts, which were ten feet and eight inches apart. When the gate was open, the passage-way was about nine feet wide, the rest of the space being occupied by the gate, posts and a fence running from the posts to a building.

The defendant's rear building has never been used as a stable, but the other three have been so used, the cellar for stabling horses, the first story as a carriage-house, and the upper floor for the storage of hay and grain. The stalls for the horses were in the front part of the cellar, facing the areas in the alley, which furnished light and ventilation. The alley was used for the passage of light carriages, as well as for the heavier vehicles that carried in hay, straw and grain, and carried out refuse. Furniture was also occasionally drawn in that way and ashes drawn out.

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The defendant has constructed over the alley-way at the rear of his premises a brick building, one story high, resting on iron girders that are supported by walls on either side. The gate has been removed and the entrance is now fourteen feet ten inches wide in the clear, where it used to be nine feet. A portion of the space formerly occupied by the vault is used for steps to descend into the cellar, and there is a substantial iron railing around the opening. Outside of the railing the alley-way is twelve feet five inches wide, and at all other points under said structure, sixteen feet eight and one-half inches wide. The road-way formerly leading into defendant's cellar has been removed. The distance from the surface of the alley-way to the bottom of the building over the alley-way varies from ten feet seven inches to about eleven feet, the difference depending upon the grade of the pavement beneath, which is lower in the center and higher at the sides. The doors leading into plaintiff's stable are fourteen inches lower than the opening over the alley-way under said building.

The trial court found that "the carriage-way through the defendant's premises is as convenient in regard to breadth for egress and ingress of vehicles as it was before the defendant made the changes" in question, and that "it does not appear that the ingress or egress of any vehicle has been in any respect interfered with or rendered less commodious by reason of the alterations made by the defendant over or upon the alley-way." It was further found that "it does not appear that any vehicle has ever been driven into the alley-way which could not be conveniently driven under the structure as it now exists; that the alley-way as it now exists upon the premises of the defendant, has sufficient light and air for all purposes of egress and ingress; that hay and straw are commonly furnished to customers in the city of New York in bales, and as ordinarily loaded upon a single truck, a load of hay or straw could pass under the building erected by the defendant over the alley-way; that it is usual for the sellers of hay or grain in the city of New York to deliver hay and straw at the stables of customers without special charge for delivering, and the seller of

Statement of case.

feed makes up the loads with reference to the height of the doorway through which his vehicle may have to pass; that hay and straw can be conveniently delivered at the stable of the plaintiff in accordance with the usage of business in the city of New York without any inconvenience or cost to him by reason of the building constructed over the alley-way by the defendant; that such vehicles as ordinarily go to livery stables and to private stables can readily and conveniently pass under an opening ten feet high; that the ingress and egress to and from the plaintiff's stable are convenient and the changes made by the defendant have not interfered with the plaintiff's reasonable use of the alley-way and his convenient access to and egress from his stable."

As conclusions of law the court found that the plaintiff has no right to claim that the whole of the carriage-way should be left open for his use, but only so much thereof as will not interfere with his access to or egress from the stable to which it is an appurtenance; that he has no right to light or air by means of the alley-way, except such as is necessary to make the access to the premises effectual; that the only easement to which he is entitled is the right of passage, which is preserved in its integrity, and that no right of the plaintiff has been infringed by the erection in question. The complaint was dismissed on the merits, with costs.

Further facts appear in the opinion.

Treadwell Cleveland for appellant. In construing a grant or reservation of a right of way, the court must take into account the nature and condition of the premises granted at the time of the execution of the deed, the purposes that the parties must have had in view, and the uses which, in practice, have been made of the way by the parties in interest. The acts of the parties and the manner in which they have been accustomed to exercise their rights are evidence of the extent of such rights under the grant. (*Rowell v. Doggett*, 143 Mass. 483, 487; *Burnham v. Nevins*, 144 id. 88; *McConnell v. Rathburn*, 46 Mich. 303; *Baker v. Fleck*, 45 Md. 337;

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Herman v. Roberts, 119 N. Y. 37; *Onthank v. L. S. & M. S. R. R. Co.*, 71 id. 196.) Plaintiff is entitled to insist upon the way remaining in the same condition, and of the same extent as when originally "laid out." (*Lattimer v. Levering*, 72 N. Y. 174; *Atkins v. Boardman*, 2 Met. 457; *Salisbury v. Andrews*, 19 Pick. 250; *Gerrish v. Shattuck*, 128 Mass. 571, 574; *Welch v. Wilcox*, 101 id. 162, 164; *T. I. Co. v. Cunningham*, 8 Allen, 139; *Doyle v. Lord*, 64 N. Y. 432; *Freeman v. Sayre*, 48 N. J. L. 37; *Rivera v. Finn*, 3 N. Y. Supp. 22.)

Stephen H. Olin for respondent. As the defendant's lot was conveyed by Davis on June 17, 1852, and the plaintiff's lot on December 21, 1852, there is no implied reservation in favor of the plaintiff. (*Wheeldon v. Burroughs*, L. R. [12 Ch. Div.] 31; *Shoemaker v. Shoemaker*, 11 Abb. [N. C.] 80; *Outerbridge v. Phelps*, 13 id. 117.) The reservation of a right of way does not include a right to receive light and air over the defendant's premises, upon the plaintiff's premises. An easement to receive light and air must be created by deed, at least in cases where the servient tenement is first severed. (*Grafton v. Moir*, 1 N. Y. Supp. 4; *Shipman v. Beers*, 2 Abb. [N. C.] 435; *Spies v. Dam*, 54 How. Pr. 293; *Brooks v. Reynolds*, 106 Mass. 31; *Doyle v. Lord*, 64 N. Y. 432, 439; *Gerrish v. Shattuck*, 132 Mass. 235.) The plaintiff has a right to pass over the alley. The defendant has a right to make every use of the soil consistent with this easement. He may build over the alley provided he leaves it open a sufficient height to allow such vehicles to pass as usually are drawn up a narrow alley to a small private stable, that being the servitude impressed on the land. (*Herman v. Roberts*, 119 N. Y. 37; *Atkins v. Boardman*, 2 Met. 457; *Gerrish v. Shattuck*, 132 Mass. 235; *Rexford v. Marquis*, 7 Lans. 249; *Bateman v. Talbot*, 31 N. Y. 371; Washb. on Ease. [4th ed.] 188; *Avery v. N. Y. C. & H. R. R. Co.*, 106 N. Y. 942.)

VANN, J. The right of the defendant to erect the building in question depends upon the reservation contained in the deed

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dated June 1, 1852, by which the original proprietor of the four lots conveyed the first to the defendant's grantor and is not at all dependent on the reservation in the later deed, dated December 31, 1852, by which said proprietor conveyed the third lot to the plaintiff's grantor. The rights of the defendant were defined and fixed by the earlier conveyance and were not cut down or affected by the later conveyance to which he was neither party nor privy. The reservation in the deed under which the defendant claims, and which created the easement over the alley so far as it affects his premises, is in these words:

"Reserving, nevertheless, to the owners and occupants of the three houses and the three stables on the easterly side of Fifth avenue, next north of the premises above conveyed, the right of way through and over the carriage or alley-way in the rear of the said above-granted premises to the three stables next north of the one standing on the rear of the above-granted premises, as long as the said three stables shall be occupied as private stables."

As the conveyance was in fee, it vested in the grantee and his assigns all the rights of absolute ownership, except as restricted by the reservation, which, being in favor of the grantor is to be construed most strongly against him. (*Duryea v. Mayor, etc.*, 62 N. Y. 592, 597; *Borst v. Empie*, 5 id. 33, 39; *Jackson v. Blodgett*, 16 Johns. 172; *Jackson v. Gardner*, 8 id. 394; *Ives v. Van Auken*, 34 Barb. 566.)

The reservation is of "the right of way through and over the carriage or alley-way" to the stables and is to continue as long as the stables are "occupied as private stables." The grantor did not reserve the alley-way, itself, but the right of way over it, which means simply the right to pass over it. (*Bodfish v. Bodfish*, 105 Mass. 319; *Kripp v. Curtis*, 71 Cal. 63; *Stuyvesant v. Woodruff*, 1 Zab. 133; *Williams v. W. U. R. Co.*, 50 Wis. 76; 2 Washburn on Real Prop. 275.)

The right of way was not reserved for all purposes, but for the use of private stables only, as the right continues while the buildings are used for that purpose and ceases when the

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specified user ceases. It was not bounded or defined, except as it was limited to the use named. Nothing except a right of way as thus limited, was reserved. While the alley-way, as laid out at the date of the grant, was eighteen feet wide, the right to pass over every part of that eighteen feet was not reserved, unless that right was necessary in order to pass and repass in the usual way and with the usual means, between the stables and the street. The use by the grantor of the words "carriage or alley-way," in the alternative indicates that he regarded "carriage-way" and "alley-way" as meaning the same thing and that he meant by neither the alley as laid out, but the carriage-way that passed over the alley. In fact he did not use the word "alley" by itself, at all, but he is presumed to have had in mind the existing condition of things upon which his conveyance was to operate.

Thus we have a right of way reserved, but not specifically defined and the rule in such cases is that the way need be only such as is reasonably necessary and convenient for the purpose for which it was created. (*Atkins v. Bordman*, 2 Metc. 457; *Bliss v. Greeley*, 45 N. Y. 671; *Bakeman v. Talbot*, 31 id. 366, 370; *York v. Briggs*, 7 N. Y. S. R. 124; *Maxwell v. McAtee*, 48 Am. Dec. 409; *Rexford v. Marquis*, 7 Lans. 249; *Matthews v. D. & H. Canal Co.*, 20 Hun, 427; *Spencer v. Weaver*, Id. 450; *Tyler v. Cooper*, 47 id. 94; affirmed, 124 N. Y. 626; Washburn on Easements, 244; Goddard on Easements, 333.)

When the right of way is not bounded in the grant, the law bounds it by the line of reasonable enjoyment. The defendant, as owner of the land, has the right to use it in any way that he sees fit, provided he does not unreasonably interfere with the rights of the plaintiff. All that is required of him is that he shall not so contract the alley-way, either vertically or laterally, as to deprive the plaintiff of a reasonable and convenient use of the right of passing to and fro. Thus the grant of a right of way "through and over" a space twenty feet wide, was held to be "the grant of a convenient way within those limits." (*Johnson v. Kinnicutt*, 56 Mass. 153.)

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As is said in Goddard on Easements (p. 332): "A right of way along a private road belonging to another person does not give the dominant owner a right that the road shall be in no respect altered or the width decreased, for his right does not entitle him to the use of the whole of the road, unless the whole width of the road is necessary for his purpose, but is merely a right to pass with the convenience to which he has been accustomed; * *. * and even where a right of way was granted over certain roads marked on a plan, and one was described there as forty feet wide, it was held that the grantee was entitled to only a reasonable enjoyment of a right of way, and that such reasonable enjoyment was not interfered with by the erection of a portico, which extended a short distance into the road, so as to reduce it at that point to somewhat less than forty feet." (Citing *Clifford v. Hoare*, L. R. [9 C. P.] 362; *Hutton v. Hamboro*, 2 Foster & Finlason, 218.)

Was eighteen feet in width, or more than eleven feet in height, essential to the reasonable enjoyment by the plaintiff of a mere right of passing to and fro with such vehicles as are used at private stables? Is not the right of way, as it now is, all that is reasonable and necessary for the purpose for which it was granted? When the terms of the reservation are considered in connection with the nature and condition of the premises granted at the time of the execution of the deed, the purpose that the parties are presumed to have had in view and the use which in practice they have made of the way, as found by the trial court, we are of the opinion that the defendant has not interfered with the reasonable enjoyment by the plaintiff of the easement created by the grant.

It is insisted, however, in behalf of the plaintiff, that he is entitled to the light, air and ventilation coming through and over the open space which constituted the alley at the date of the deed. If the alley itself had been reserved, or the right to use it for every purpose, a different question would have arisen, but neither the alley nor the alley-way was reserved, nor anything except the right of way over the alley-way or carriage-way. The language of the reservation confers upon the

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plaintiff simply the right of passage and, as incidental thereto, such light and air as are necessary to the convenient enjoyment of that right. There is no provision which expressly or impliedly requires that the entire space at the rear of defendant's building shall be kept open forever, so that the plaintiff's stables may have air and light. A right of way to a stable does not carry with it such light and air as the stable needs, but such as the right of way needs for its reasonable enjoyment. As was said in *Atkins v. Bordman* (*supra*), the leading case upon the subject: "As to the darkening * * * the defendants were not liable for damages, unless, from the length of the passage-way, it was so darkened as to render it unfit for the purposes of a passage-way. We may conceive of a covered passage of eight or ten feet high, of a length so considerable that unless openings were left, there would not be light enough admitted at the ends to enable persons to use it with comfort for the purposes of a passage-way, but unless darkened to that extent, it is not a case for damages." (Citing *Parker v. Smith*, 5 Car. & P. 438; *Back v. Stacey*, 2 id. 465; *Wells v. Ody*, 7 id. 410; *Pringle v. Wernham*, Id. 377.)

In *Gerrish v. Shattuck* (132 Mass. 235), the defendant built over "a passage-way four feet wide" that had been reserved "in, through and over" certain premises, but placed no part of his building on the surface of the ground and left the way unobstructed for a reasonable height above. It was held that the plaintiff, as the dominant owner, had "no right to light and air above the way," and that she had "only the right of passing and repassing, with such incidental rights as are necessary to its enjoyment."

To the same effect is *Burnham v. Nevins* (144 Mass. 88).

But where the easement was "a passage-way five feet wide in the clear for light and air" and "always to be kept open for the purpose aforesaid," it was held that the dominant owner had a right to the open and unobstructed passage of light and air from the ground upwards and throughout the length of the passage-way. (*Brooks v. Reynolds*, 106 Mass. 31.)

If the alley-way in question had been protected by a restric-

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tion of that kind, the claim of the plaintiff would have had a basis in the deed, which would have shown on its face that it was the purpose of the parties to create something more than a mere right of passage. As it is we can find no such intention, because, as we have held, the deed calls for a right of way and nothing more. The space at the rear of the plaintiff's premises is under his exclusive control, subject to the right of way over it, and he can ventilate and light his stable by keeping that space open, but he cannot prevent his neighbor, two doors away, from building on his own land, even if it cuts off some light and air, as long as a suitable passage is left open, with enough light and air to conveniently use it.

Upon the facts as found and under the conveyance as we construe it, no right of the plaintiff has been interfered with by the defendant, and the judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

130 474
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JAMES F. MASON et al., Respondents, v. GEORGE Y. SMITH et al., Appellants.

A purchaser, receiving goods under an executory contract of sale, in order to preserve his right to rescind, must examine the goods within a reasonable time after receipt, and if they are found not to conform to the contract as to quality or kind, promptly rescind, either returning or offering to return the goods.

Defendants ordered from plaintiffs a quantity of gloves of a specified quality and price; the gloves were shipped and received by the defendants; they, about three weeks after such receipt, returned a portion of the gloves as defective, with a letter stating that they had examined every pair and were not satisfied with them and would like to return them all. Plaintiffs credited defendants with the gloves returned and wrote them stating they were at liberty to return all not satisfactory, in exchange for which plaintiffs would send "A No. 1 goods." Defendants returned at different times the gloves unsold, with requests that plaintiffs would credit them with the amounts. Plaintiffs sent other perfect gloves for those returned, which defendants, without opening the box containing them, refused to receive, but caused them to be

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returned to plaintiffs, who refused to receive them. In an action to recover the purchase-price, *held*, that as defendants after having, as shown by their first letter, examined all of the gloves, retained a portion, they must be deemed to have elected to retain them under the contract, and thereupon their right to rescind ended; that their expressions and dissatisfaction did not amount to a rescission, and the gloves subsequently returned were to be considered as having been so returned in accordance with plaintiffs' offer to replace them with other gloves, and this having been done, plaintiffs were entitled to recover.

(Argued December 17, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 26, 1889, which affirmed a judgment in favor of plaintiffs entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Arthur R. Robertson for appellants. The return of the gloves under the letters and bills accompanying them after the return and objections of October sixth, and the plaintiffs' admissions of October twenty-second in reply and plaintiffs' acceptance and retention of the gloves under those letters and bills are a complete defense to all of plaintiffs' claim that is disputed. (*Dent v. N. A. S. S. Co.*, 49 N. Y. 390; *Norton v. Dreyfuss*, 108 id. 90.) The severable lot of ladies' gloves not complying with the contract never having been, in point of fact, accepted by defendants, and so the title to them never having passed, the return was of itself a complete defense (even independently both of the letters and bills accompanying the returns, and of the acceptance of the returns under those letters and bills). (*Hatch v. O. Co.*, 100 U. S. 124; *Terry v. Wheeler*, 25 N. Y. 520; *Pierson v. Crooks*, 115 id. 539; *Gurney v. A. & G. W. R. Co.*, 58 id. 358.) The defective character of the gloves, their return for non-compliance with the contract and their acceptance back by plaintiffs constitute a complete defense as to the gloves in controversy. (*Norton v. Dreyfuss*, 106 N. Y. 90.) If, however, there could be any

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doubt on the point that defendants were not liable for the gloves that had been sent them by "mistake," and that they had returned, then the case should have gone to the jury on the intentions of the parties as requested by the defendant's counsel. (*Norton v. Dreyfuss*, 106 N. Y. 90; *Gurney v. A. & G. W. Co.*, 58 id. 358; *Gautier v. D. M. Co.*, 13 Hun, 524; *Powell v. Powell*, 71 N. Y. 71; *Nat. Bank v. Dana*, 79 id. 112.) If a party moves for a nonsuit or for a verdict in his favor, and his motion is denied, he has the right to request the court to submit the facts of the case to the jury, and he stands in the same position, so far as a review of the denial of his request to the jury is concerned, as he would if no motion for a nonsuit or verdict in his favor had been made. (*Koehler v. Adler*, 78 N. Y. 287.) The evidence as to custom should have been retained. (*Newhall v. Appleton*, 114 N. Y. 140; *Clarke v. Baker*, 11 Metc. 186; 1 Smith's L. C. 418.)

John M. Carroll for respondents. Upon the delivery to and receipt by the defendants of the gloves ordered the title to them vested in the defendants subject only to the right of the defendants to rescind the contract in case the gloves were found not to conform to the order. (*Reed v. Randall*, 29 N. Y. 358; *C. I. Co. v. Pope*, 108 id. 232; *G. M. Co. v. Allen*, 53 id. 515; *Hargous v. Stone*, 5 id. 73; *McCormick v. Sarson*, 45 id. 265; *Brown v. Foster*, 108 id. 387; *Beck v. Sheldon*, 48 id. 365, 373.) A new and independent contract was made which was fully performed by the plaintiffs. No action could be maintained upon it by the defendants, even if it had been pleaded. (*Blanchard v. Trimm*, 38 N. Y. 225, 228; *Dent v. N. A. S. Co.*, 49 id. 390.) But if that contract be not regarded as an independent one, but as a mere modification of the original contract of sale, so as to allow the defendants to return the defective goods, and the plaintiffs to deliver in place thereof perfect ones, the same result follows; and the defendants having returned defective goods, are bound to accept and receive perfect goods sent to them in place thereof by the plaintiffs. They cannot accept the benefits of

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the proposition and reject its burdens. (*Cassidy v. Lefevre*, 45 N. Y. 565; *Brown v. Foster*, 108 id. 387.) The court did not err in striking out the testimony of witness Shenelon in relation to custom in Kansas City. (*Higgins v. Moore*, 34 N. Y. 417; *Barnard v. Kellogg*, 10 Wall. 383; *C. E. Bank v. N. Bank*, 91 N. Y. 74; *S. Bank v. N. Bank*, 67 id. 458; *Bierne v. Dord*, 5 id. 95; *Thompson v. Ashton*, 14 Johns. 316; *Frith v. Barker*, 1 id. 327; *Harris v. Tunbridge*, 83 N. Y. 92.) The court did not err in permitting the plaintiffs to prove by witness Shenelon that the defendants had purchased similar gloves of Wertheimer & Co., and for a less price. (*D. S. B. Co. v. Gardner*, 101 N. Y. 387; *City of Brooklyn v. B. C. R. R. Co.*, 47 id. 475.) The court did not err in denying the defendants' request, to go to the jury, generally as to the intention of the parties. (*Dent v. N. A. S. Co.*, 49 N. Y. 390.)

HAIGHT, J. This action was brought to recover the contract price for gloves sold.

The plaintiffs are manufacturers and importers of gloves at Johnstown, N. Y.

The defendants are retail sellers of gloves and other dry goods in Kansas City, Mo.

On the 8th day of April, 1887, the defendants ordered from the plaintiffs a quantity of gloves of a specified quality and price, thereafter to be imported and delivered. On the 31st day of August, 1887, the gloves were shipped, and received by the defendants on September seventeenth thereafter. The defendants carefully examined every pair of gloves so received, and finding some of them defective, on the 6th day of October, 1887, returned 2½ dozen to the plaintiffs with the following letter :

"GENTLEMEN.— We return to you to-day, U. S. Ex., kid gloves, as per enclosed bill. You will find on examination that they are not perfect, and for this we will ask you to kindly credit our account with amount.

"We have, at this late date, examined every pair of this

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glove, and are not at all satisfied with them. Would much rather return same to you than to place them on sale, as they do not open up as we think they should. We should prefer not to accept these even at a 10 per cent allowance.

"Should have advised you at an earlier date, but could not make proper examination sooner. Awaiting your reply, we remain,

Yours resp.,

"G. Y. SMITH & CO.

"T. C. S."

The plaintiffs credited the defendants with the price of the gloves returned, and on October twenty-second wrote the defendants acknowledging the receipt of the goods, and that the gloves were not of the quality that they should be, and concluded as follows:

"You are at liberty to examine our goods, pick out the seconds, and all the goods (leaving the matter to your judgment and idea of what is fair) which are not satisfactory you may return, and we will be glad to send you in exchange A No. 1 goods. We wish to do what is right in this matter, and trust that in the above proposition you will find proof of the fact.

"Hoping this will meet your approval, and awaiting returns, we are,

Yours, very truly,

"MASON, CAMPBELL & CO."

After the receipt of this letter the defendants, on the 26th of October, 1887, returned 37 7-12 dozen gloves, with the following letter:

"GENTLEMEN.—Your favor of the twenty-second inst. received and contents carefully noted. After making another thorough examination of the kid gloves in question, we have decided to return them. This we do to-day by U. S. Ex. We enclose bill, and ask you to please credit us with the amount.

Yours truly,

"G. Y. SMITH & CO.

"T. C. S."

On October 28, 1887, the defendants returned another quantity of gloves, with the following:

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"GENTLEMEN.—We return to you to-day, U. S. Ex., No. 864, 2 7-12 doz. men's gloves. These goods are worse than the worst of seconds, and are such that we cannot use.

"In ordering, we gave our order for first quality of goods, not seconds, as sent.

"With these return the ladies black piques, and will ask you to kindly credit both lots. We do this very reluctantly, but are compelled to do so in order to protect both our customers and ourselves. Yours resp.,

"G. Y. SMITH & CO.

"T. C. S."

On November 3, 1887, the defendants returned the balance of the gloves remaining unsold, with the following:

"GENTLEMEN.—By to-day's exp. we return to you the No. 946 kid gloves. We have kept these until now, thinking that we could possibly dispose of them, but we find that they are so entirely unsatisfactory that we think it best to return them now.

"We think that you will plainly see that we are justified in doing this. We hope that you will have no hesitancy in crediting them. Please do so, and greatly oblige,

"Yours truly,

"G. Y. SMITH & CO.

"T. C. S."

On the return of these goods the plaintiffs, under date of November 10, 1887, forwarded to the defendants other goods of like numbers and quantity of A No. 1 quality, in accordance with the proposition embraced in their letter of October 22, 1887, with the following letter:

"GENTLEMEN.—We are in receipt of your favors of Oct. 25th, Oct. 27, and Nov. 3d, with goods referred to in each respectively.

"We have examined every pair of these goods and this day, according to agreement, we return to you other goods perfect in every particular, as follows: * * *

"Yours truly, etc.,

"MASON, CAMPBELL & CO.

"D. M."

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The defendants refused to receive these goods and caused them to be returned to the plaintiffs without opening the box containing them. The plaintiffs refused to receive them on their return and brought this action to recover the purchase-price.

The contract for the sale and delivery of the gloves was executory. It became the duty of the defendants on the arrival of the goods, or within a reasonable time thereafter, to examine them and determine whether or not they were of the kind and quality ordered, and if they were found not to comply as to quality and kind, to promptly rescind the contract, and either return or offer to return the goods to the plaintiffs. (*Reed v. Randall*, 29 N. Y. 358; *Gaylord Manufacturing Co. v. Allen*, 53 id. 515; *Coplay Iron Company (Limited) v. Pope*, 108 id. 232.)

As we have seen, the defendants had examined every pair of the gloves before October sixth. They expressly so state in their letter of that date. There could consequently be no question of fact for the jury as to whether they had been given a reasonable opportunity to examine, for on that day they had examined and then returned to the plaintiffs such goods as they saw fit, and they were accepted and the amount thereof credited to the defendants. If the defendants had not desired to keep the other goods they should have then rescinded the contract and either returned or offered to return them, and in failing to do this they must be deemed to have elected to retain them under the contract. (*Beck v. Sheldon*, 48 N. Y. 365.)

It is true that the defendants in their letter of that date complained as to these goods and stated that they were not satisfied with them; that they would rather return them than to place them on sale, as the goods did not open up as the defendants think they should, and that they would prefer not to accept them even at a ten per cent allowance. But this does not amount to a rescission of the contract. The most that can be claimed is that it is an invitation for a proposal modifying the terms of the contract. Such a proposal was incorporated

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in the plaintiffs' letter of October twenty-second. It was, in brief, that the defendants might return such goods as were not satisfactory and they would replace them with A No. 1 goods, and on the receipt of this by the defendants the goods were returned without a word or suggestion that they were not returned in accordance with the offer made. Under these circumstances we think the plaintiffs were fully justified in understanding and believing that the goods returned were to be replaced by new goods in accordance with their letter; that such a conclusion would be warranted from a fair interpretation of the correspondence referred to. It is apparent that this construction should prevail, for as we have already shown, the time in which the defendants had the right to rescind the contract and return the goods under the original contract had passed. They could legitimately do so only under the offer of October twenty-second.

Stress is laid by the appellants upon their request to "credit us with the amount" in their letter of October twenty-sixth, but it does not appear to us that this request has any significance, or that it gave the plaintiffs notice, or led them to understand, that the goods were not returned in accordance with their proposal of the twenty-second. It is the usual practice among dealers of the character of these parties to charge for the goods when shipped, and if returned to credit back, and in case new goods are shipped, to again charge for such goods. Such is the way in which their books are ordinarily kept. If the goods returned were accepted by the seller, he would, of course, credit them upon the account of the purchaser, even though he was to send new goods in their place.

The judgment should be affirmed, with costs.

All concur with HAIGHT, J., except LANDON, J., not sitting, and BRADLEY, J., who dissents on the ground that whether or not there was any agreement between the parties which permitted the plaintiffs to send to the defendants and required the latter to accept gloves in place of those returned to the plaintiffs after their letter of October 22, 1887, to the defendants, was a question of fact, which should have been submitted to

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the jury. And, therefore, the defendants' exceptions to the refusal to submit the question to them, and to the direction of the verdict, were well taken.

Judgment affirmed. _____

ABEL R. HIGGINS, Appellant, v. ABIGAL McCONNELL,
Impleaded, etc., Respondent.

The interest of a vendee, in possession of lands under a contract for the purchase thereof, upon which he has made partial payments, and to a conveyance of which he is entitled on completing his payments, may be levied upon by virtue of an attachment duly issued in an action against him. (Code Civ. Pro. § 645.)

A provision in such a contract that the vendee shall not assign the same without the consent of the vendors, is not broken where the transfer is by operation of a judgment.

Higgins v. McConnell (56 Hun, 277), reversed.

(Submitted December 21, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which directed a final judgment dismissing the complaint, and reversed an interlocutory judgment in favor of the plaintiff entered upon an order of the Special Term overruling defendant's demurrer to the complaint.

This was an action to determine conflicting claims to the interest of the purchaser in a contract for the purchase and sale of lands and for a specific performance.

On January 5, 1875, Maximilian Hammond Dalison and Alfred Markby, as trustees, under the will of Richard Thomas Pulteney Pulteney, were seized of certain lands and premises situate in the town of Avoca, Steuben county, N. Y., and on that day entered into a contract with Abigal McConnell, for the sale thereof to him. Thereafter sundry payments were made upon said contract by him.

On March 17, 1886, an action was commenced in this court by the plaintiff against said Abigal McConnell and one Dexter McConnell, defendants, to recover upon their three promissory

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notes given for merchandise, and on March 18, 1886, upon the application of plaintiff, a warrant of attachment was duly granted in said action, against the property of said defendant, Abigal McConnell, and delivered to the sheriff of the county of Steuben.

On the 19th day of March, 1886, pursuant to the said attachment, and the statute and practice in such case made and provided, all of the right, title and interest of the said defendant, Abigal McConnell, in said contract and lands was duly attached and notice thereof on that day duly filed and recorded in Steuben county clerk's office according to law.

On September 27, 1887, plaintiff recovered a judgment in said action against the said defendant, Abigal McConnell, and on October 5, 1887, an execution upon the said judgment was duly issued and delivered to said sheriff who, in pursuance of the said execution, duly advertised to be sold all the right, title and interest which the said defendant, Abigal McConnell, had in said contract and in said lands under said contract, on the 19th day of March, 1886, the time when the same was attached as hereinbefore set forth, and the said right, title and interest of said Abigal McConnell, in or under said contract, was on the 19th day of November, 1887, pursuant to said advertisement, sold at public sale, and the same was struck off to the plaintiff who was the highest bidder therefor, and on the same day, said sheriff executed and delivered to this plaintiff, a certificate of such sale.

Some time after the 19th day of March, 1886, said Abigal McConnell executed and delivered to the defendant Linderman an instrument in writing purporting to assign to him the said contract, or her interest therein, and said Linderman now claims some right or interest in said contract under said alleged assignment.

Said assignment was made and intended by the parties thereto as security for an alleged pre-existing indebtedness of said Abigal McConnell.

Said Abigal McConnell is in possession of said premises, and withholds possession of the same from the plaintiff.

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Before the commencement of this action the plaintiff offered to pay to said trustees the amount unpaid upon said contract, and requested them to convey said premises to plaintiff, but said trustees have refused and still refuse to convey unless and until the conflicting rights of the parties in respect to said lands and contract shall be determined in an action in equity for that purpose, and the plaintiff, therefore, brought this action.

J. F. Parkhurst for appellant. By levying the attachment, plaintiff acquired a lien upon defendant's interest in the land held under contract, and such interest was properly sold thereunder. (Code Civ. Pro. §§ 645, 656, 1253, 1274; Gerard on Titles [2d ed.], 712; *Lee v. Hunter*, 1 Paige, 519; *Wright v. Douglass*, 2 N. Y. 376; Watson on Sheriffs, 208; *White v. Butler*, 29 Mich. 129; *Page v. Rogers*, 31 Cal. 293; *Slater's Appeal*, 29 Penn. St. 169; *R. P. Co. v. Dougherty*, 81 N. Y. 481; *Jackson v. Scott*, 18 Johns. 94; *Jackson v. Walker*, 4 Wend. 463; *Lynch v. Crary*, 52 N. Y. 84; *Thurber v. Blanck*, 50 id. 84; Pom. Eq. Juris. §§ 1410, 1411, 1412.) The objection that the McConnell contract was not within the meaning of section 645, because of the clause prohibiting its assignment without consent of the vendors, has no force. (Gerard on Titles [2d ed.], 137, 138; *Overbagh v. Patrie*, 8 Barb. 28; 6 N. Y. 510.)

Hakes, Page & Acker for respondent. The alleged sale of defendant's interest in the land contract was an absolute nullity, because such a sale upon execution is expressly prohibited by the Code. (Code Civ. Pro. §§ 644, 1253; 1 R. S. 744, § 4; *Sage v. Cartwright*, 9 N. Y. 49; *Hotailing v. Hotailing*, 47 Barb. 63.) The equitable interest of the defendant McConnell was not the subject of levy under the attachment. (*T. G. C. Co. v. Smith*, 110 N. Y. 83; *McCauley v. Smith*, 32 N. Y. S. R. 745; Kneeland on Attach. §§ 324, 325-328; *Disborough v. Outcalt*, 1 Saxt. 298; *Anthony v. Wood*, 96 N. Y. 180; *Manchester v. Tibbetts*, 121 id. 219; *Hawley v. James*, 5 Paige, 318; *Powers v. Ingraham*, 3 Barb. 576; *Tibbs v.*

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Morris, 44 id. 138; *Stone v. Sprague*, 24 N. Y. 509; *Lee v. Hunter*, 1 Paige, 536.) Assuming that the plaintiff had an attachable interest in the land, then the complaint fails to state a cause of action, unless it should be held that the sheriff's sale of this equitable interest was of some force. (Code Civ. Pro. § 1874; *Bowe v. Arnold*, 31 Hun, 256; *Thurber v. Blanck*, 50 N. Y. 80-86; *Anthony v. Wood*, 96 id. 160; *Adee v. Bigler*, 81 id. 349; *Geary v. Geary*, 63 id. 352; *Adsit v. Butler*, 87 id. 585.) It is submitted that the complaint is defective also in not stating facts showing that the warrant of attachment was duly granted. (Code Civ. Pro. § 532.) There being no answer interposed by the respondent, the appellant cannot claim that the complaint authorizes any judgment different from his prayer for relief. (*Evans v. Burton*, 5 N. Y. S. R. 216; *Stevens v. Mayor, etc.*, 84 N. Y. 296; *Kelly v. Downing*, 42 id. 71.)

LANDON, J. The question presented by the demurrer to the complaint is whether the interest of a defendant under a contract for the purchase of the land upon which he has made partial payments, and is in possession, and entitled to a conveyance of the land upon completing his payments, can be levied upon by virtue of an attachment duly issued in an action against him in the Supreme Court.

We think it can. Section 644, Code C. P., provides that the sheriff must execute the warrant of attachment "by levying upon so much of the personal and real property of the defendant, within his county, not exempt from levy and sale by virtue of an execution, as will satisfy the plaintiff's demand, with the costs and expenses." This, in terms, provides for a levy upon real property, and admits of the distinction between the property itself and an interest in the property, and suggests that the authority to levy upon the real property of the defendant is no authority to levy upon the real property of another in which the defendant has only some interest less than a legal estate. But section 645 was added; it was a new provision, and declared that "The real property which may be levied upon

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by virtue of a warrant of attachment, includes any interest in real property, either vested or not vested, which is capable of being aliened by the defendant.”

The interest of the defendant under this contract for the purchase of the land comprises the actual possession, the right of possession, and the right to acquire the right of property. It is a valuable interest, and is alienable.

The question whether the interest of a person holding a contract for the purchase of land was bound by a judgment and could be sold upon execution, was, prior to the Revised Statutes, the subject of frequent and conflicting decisions. The Court of Errors, in 1819, in *Bogert v. Perry* (17 Johns. 351), held that it could not be, but the Supreme Court subsequently held that it could be, if the holder of the contract was in possession. (*Jackson v. Scott*, 18 Johns. 94; *Jackson v. Parker*, 9 Cow. 73.)

The Revised Statutes provided that such an interest should not be bound by the docketing of any judgment or decree, nor sold by execution issued thereon. (1 R. S. m. p. 744, § 4.) The question, as we learn from the reviser's notes, was one of public policy, and in order to mitigate the injustice of the rule adopted, the following sections provided that such an interest might be reached by means of an action in the nature of a creditor's bill.

These provisions are substantially re-enacted in sections 1253, 1874, 1875 of the Code of Civil Procedure; the corresponding provisions of the Revised Statutes were repealed by chapter 245, Laws of 1880.

Section 1253 provides that “the interest of a person holding a contract for the purchase of real property, is not bound by the docketing of a judgment, and cannot be levied upon or sold by virtue of an execution issued upon a judgment.” It is thence argued by the defendant that the interest in question cannot be attached. But the argument is untenable if this section and section 645 are reconcilable one with the other.

It does not necessarily follow that a provision as to the effect of a judgment and execution in the absence of an attachment,

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controls other provisions as to their effect when aided by an attachment. Section 1370 prescribes the requisites of an execution where a warrant of attachment issued in the action has been levied by the sheriff. Section 708, subdiv. 2, prescribes the duty of the sheriff to whom such an execution is issued. He does not re-levy upon any of the attached property, the execution simply authorizes him to sell it.

There are valid reasons why an attachment should reach the interest of a holder of a contract for the purchase of land. He may be a non-resident and never come within the state, so that personal service can be made upon him. In such case the personal judgment which must precede a judgment creditor's action cannot be obtained. But if his interest can be seized upon attachment, jurisdiction of that interest can be obtained and it can be disposed of to satisfy the domestic creditor. (Code C. P. § 707.) The reasons which withdraw the interest in question from the binding force of a judgment and execution are technical, and the relaxation of the rule in the case of attachments seems to be in the interest of substantial justice. The letter of section 645 permits this attachment; other provisions show the policy of the law to be to extend the scope of this remedy; it can scarcely be doubted that when the framers of section 645 employed the words "any interest in real property" to indicate what was attachable, that this peculiar interest which had engaged the attention of the courts and legislature was considered; and if we concede that it was not, it would still remain to be held that if it had been considered the language of the section would have been different. It was held in *Wright v. Douglass* (2 N. Y. 376), in reference to the provision for the attachment "of all the estate real and personal of such corporation," that "the statute in terms applies to an equitable as well as a legal interest in lands." Section 645 does not appear to be less comprehensive, and we see no reason why we should narrow its scope by construction.

There is a provision in the contract that the vendee will not assign the same without the written consent of the vendors;

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this provision concedes the alienable quality of the interest and provides by the personal covenant of the vendee against it. Such a covenant is not broken where the transfer is by the operation of a judgment. (*Jackson v. Silvernail*, 15 Johns. 278; *Jackson v. Corliss*, 7 id. 531; *Smith v. Putnam*, 3 Pick. 221.) The defendant has not assigned. (*Roosevelt v. Hopkins*, 33 N. Y. 81.)

The judgment of the General Term should be reversed, with costs, and the interlocutory judgment of the Special Term affirmed, with costs of the General Term.

All concur, except HAIGHT and BROWN, JJ., dissenting.
Judgment accordingly.

180	488
155	355

180	488
159	425

180	488
162	588

130	488
169	1310

EMORY J. BISHOP, Respondent, v. AGRICULTURAL INSURANCE
COMPANY, of Watertown, N. Y., Appellant.

A party to a contract, containing a provision that it shall not be modified or changed, except by a writing signed by him, may by conduct estop himself from enforcing the provision against a party who has acted in reliance upon such conduct. He may also be estopped by the acts of an agent who possesses, or whom he has held out to possess, his power in respect to the provision.

A policy of fire insurance issued by defendant contained a clause that in case of disagreement as to amount of loss, the same shall be ascertained by two appraisers, the insured and defendant each selecting one, who were to select "a competent and disinterested umpire." The policy also contained a condition requiring proofs of loss to be furnished within sixty days after the fire, also a provision that the company should not be held to have waived any provision or condition of the policy or the forfeiture by any act, requirement or proceeding on its part relating to an appraisal. In an action upon the policy it appeared that the property insured was destroyed by fire October 15, 1887. Defendant was notified, and on October twenty-first its general agent and adjuster called on plaintiff; they not agreeing as to the amount of loss, entered into a written agreement appointing appraisers; the agent at the time stated to plaintiff that proofs of the loss need not be furnished as the damages would soon be settled. On November twenty-eighth the appraiser appointed by plaintiff declined to act. On December twenty-second plaintiff telegraphed L., the appraiser appointed by defendant, that he

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had secured another appraiser. L. appointed December thirtieth for making an appraisal. At that date the name of N., the new appraiser, was inserted in the agreement by L. The two appraisers failed to agree, and G. as the jury found refused to agree upon a "disinterested umpire." *Held*, that the condition as to proofs of loss was waived; and that plaintiff was entitled to recover.

(Argued December 21, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action upon a policy of insurance issued by the defendant to plaintiff upon his barn and contents.

October 15, 1887, the plaintiff's barn and its contents were destroyed by fire, at which time the property was insured by the defendant for \$3,100, under a policy known as "Standard Fire Insurance Policy of the State of New York."

October seventeenth, the plaintiff gave personal notice of the loss to Samuel E. Clark, defendant's local agent, who effected the insurance, and requested him to inform the defendant of the fire, which he agreed to do, and immediately did. On the twenty-first of that month, Addice E. Dewey, defendant's general agent and adjuster, called on the plaintiff pursuant to the notice, and had an interview about settling the loss.

The plaintiff testified, and in this he was not disputed, that the liability of the defendant was not denied, the only controversy being over the value of the property destroyed, which it was agreed should be appraised pursuant to the following provision in the policy: "In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the assured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the

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award, in writing, of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire."

The plaintiff and the defendant, by its general agent and adjuster, on that day entered into a written contract, of which the following are the material parts:

"It is hereby agreed by Emory J. Bishop, of West Barre, of the first part, and the Agricultural Insurance Company, of Watertown, New York, of the Second part, that David I. Langworthy, together with Charles H. Headley (with a third person, to be appointed by them before the appraisal, who shall umpire on matters of difference only), shall appraise and estimate, at the actual cash value, the damage by fire on the 15th day of October, 1887, to the property belonging to said Emory Bishop as specified herein, which appraisement or estimate by them, or any two of them, in writing, as to the amount of such loss or damage, shall be binding on both parties; it being understood that this appointment is without reference to any other question or matter of difference within the terms and conditions of the insurance, and is of binding effect only as far as regards the actual cash value of, or damage to, such property." * * * "returning said damage in the form of a detailed statement and in accordance with this agreement."

The plaintiff selected Charles H. Headley and the defendant David I. Langworthy for appraisers.

November fourth, Langworthy called on Headley at Medina, a village ten miles from the plaintiff's residence, for the purpose of first selecting an umpire, and then going to the scene of the fire and appraising the value of the property destroyed. Headley, being on that day engaged in a law suit, declined to proceed with the business, but agreed that he would on some day thereafter. Langworthy and defendant's local agent then called on the plaintiff at his home, and made some investigation into the value of the property destroyed. Nothing further was done until November twenty-eighth, when Headley wrote

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Langworthy declining to act as an appraiser, and thereupon the latter wrote that fact to the plaintiff and requested the selection of another. December twenty-second the plaintiff telegraphed Langworthy that he had secured another appraiser, and asked when he would make the appraisal. Thereupon Langworthy appointed December thirtieth, pursuant to which he met the plaintiff at Medina, and Alderson Nixon was selected in the place of Headley and his name inserted in the written agreement. Nixon and Langworthy separated on that day without agreeing upon an umpire. Nothing further was done in the matter until January 24, 1888, when Langworthy inquired of Nixon by letter, why he had not heard from him, and suggested that the matter should be closed up. February 6, 1888, proofs of loss sufficient in form and substance were served on the defendant, but were rejected on the sole ground that they were not served within sixty days after the fire.

February twenty-third Langworthy again wrote Nixon suggesting that the appraisal should be closed, but, hearing nothing, again wrote on March twelfth, insisting on the same thing. April fourth Langworthy met Nixon at Medina, and suggested different persons to act as umpire. On that day Nixon informed Langworthy that he had been directed by the plaintiff not to correspond with him, and that he should have nothing further to do with making an appraisal.

Further facts are stated in the opinion.

A. H. Sawyer for appellant. The defendant's motion for a nonsuit should have been granted upon the ground that no proofs of loss were served upon the defendant within the sixty days required by the conditions of the policy, and that the time to serve such proofs of loss was never extended by the company in writing. (Laws of 1886, chap. 488; *Avery v. Ward*, 150 Mass. 160; Laws of 1887, chap. 429; *Walsh v. H. F. Ins. Co.*, 73 N. Y. 5; *Marvin v. U. L. Ins. Co.*, 85 id. 278; *Catoir v. Ins. Co.*, 33 N. J. L. 487; *Hankins v. R. Ins. Co.*, 70 Wis. 1; *Kyte v. Ass. Co.*, 144 Mass. 43; *McIntyre v. Ins. Co.*, 52 Mich. 188; *Cleaver v. Ins. Co.*, 65 id. 527;

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Enos v. Ins. Co., 67 Cal. 621.) The defendant's motion for a nonsuit should have been granted upon the ground that an appraisal of the property destroyed by the fire was required, pursuant to the terms of the policy, by the defendant, and that no such appraisal had been had, and that the loss, therefore, was not due or payable when this action was commenced. (*D. & H. C. Co. v. P. C. Co.*, 50 N. Y. 250, 263; *Scott v. Avery*, 5 H. L. Cas. 811; *Davenport v. L. I. Ins. Co.*, 10 Daly, 535; *United States v. Robeson*, 9 Pet. 319; *Byron v. Low*, 109 N. Y. 291; *Altman v. Altman*, 5 Daly, 436; *Whitman v. Mayor, etc.*, 21 Hun, 117; *O. S. L. & D. Co. v. C. U. Ass. Co.*, 66 Cal. 258; *Wolf v. L. & L. & G. Ins. Co.*, 50 N. J. L. 453; *Hudson v. McCartney*, 33 Wis. 331.) It was the duty of the plaintiff, seeking the enforcement of the contract of insurance, to show that everything had been done on his part which could be done to secure an appraisal of the loss and damage, and until he had shown this, in the absence of such appraisal, he cannot maintain an action under the contract. (*United States v. Robeson*, 9 Pet. 319, 327; *Davenport v. L. I. Ins. Co.*, 10 Daly, 535; *Altman v. Altman*, 5 id. 436.) The evidence in this case did not warrant the submission to the jury of the question of whether the defendant, or Langworthy, the appraiser nominated by the defendant, acted in bad faith and prevented the carrying out of the appraisal; and the charge of the court, that if Langworthy was acting in a captious manner with a determination not to agree upon anything, but to prevent an appraisal, then the plaintiff will not fail to recover so far as that branch of the case is concerned, was error. (*Whittaker v. D. & H. C. Co.*, 49 Hun, 400, 405; *Kelly v. Frazier*, 27 id. 314; *Weahle v. Haviland*, 42 How. Pr. 399, 409; *Benedict v. Johnson*, 2 Lans. 94; *Hamilton v. T. A. R. R. Co.*, 53 N. Y. 27; *Pollock v. Pollock*, 71 id. 137, 140; *Mason v. Lord*, 40 id. 477, 484; *Halpin v. P. Ins. Co.*, 118 id. 165.)

S. E. Filkins for respondent. The power to adjust is the power to settle. Dewey's power to adjust the loss includes

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the power to consent to the postponement of the service of the proofs of loss until after the negotiations for settlement of the loss have failed. (*Goodwin v. M. M. L. I. Co.*, 73 N. Y. 480, 490, 492; *Smith v. H. Ins. Co.*, 14 N. Y. S. R. 106, 114; *Kenyon v. K. T. & M. A. A. Co.*, 122 N. Y. 262; 2 Wood on Ins. [2d ed.] 1016; 85 N. Y. 283.) The acts and declarations of Dewey and of Clark, both general agents of the company, estop it from setting up as a defense the failure of plaintiff to serve his proofs of loss in the sixty days. (*Stilwell v. M. L. Ins. Co.*, 72 N. Y. 385; *Underwood v. F. J. S. Ins. Co.*, 57 id. 500; *Goodwin v. M. M. L. I. Co.*, 73 id. 481; *Smith v. H. Ins. Co.*, 14 N. Y. S. R. 112; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 68, 69; *Titus v. G. F. Ins. Co.*, 81 id. 410, 418, 419; *Prentice v. K. L. Ins. Co.*, 77 id. 483; *Leslie v. K. L. Ins. Co.*, 63 id. 27, 33; *Dilleber v. K. Ins. Co.*, 76 id. 567, 572, 573; *Brink v. H. Ins. Co.*, 80 id. 112; *Van Schorck v. N. F. I. Co.*, 68 id. 434; *Mock v. R. G. Ins. Co.*, 35 Hun, 75; *Stern v. N. F. Ins. Co.*, 89 N. Y. 315; *Pickner v. Ins. Co.*, 65 id. 207.) The last provision of the policy applies only to such waivers as might otherwise be made by agreement by the agents or officers of the company. (2 Wood on Fire Ins. 1183.) The motion to nonsuit the plaintiff on the ground that no appraisal of the property has ever been had, though required by the terms of the policy, was properly denied. (*Urhig v. W. C. F. Ins. Co.*, 101 N. Y. 365; *Mark v. N. F. Ins. Co.*, 91 id. 663; 13 Hun, 611; 39 id. 44; 17 N. Y. 491, 496; 35 Barb. 602; 39 N. Y. 377; 5 id. 422; *Crossly v. C. F. Ins. Co.*, 27 Fed. Rep. 30; *C. U. Ass. Co. v. Hocking*, 115 Penn. St. 407; 6 Cent. Rep. 915; 8 Allen, 589; *Gray v. Wilson*, 4 Watts, 41; *Mentz v. A. F. Ins. Co.*, 29 P. F. S. 480; *Hos-tetter v. City of Pittsburg*, 11 Ont. 419.) The knowledge of Smith, the sub-agent, whom Clark sent to look at the barn and property of the former fire, was the knowledge of the company. (*Smith v. H. Ins. Co.*, 14 N. Y. S. R. 106, 109, 110; 47 Hun, 30; *Wyman v. P. M. L. J. Co.*, 119 N. Y. 274; *Kenyon v. K. T. & M. A. A. Co.*, 122 id. 262; *Messleback*

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v. *Norman A. C.*, Id. 578.) No forfeiture arises from the non-service of proofs of loss within the sixty days. (*Meeyer v. K. L. Ins. Co.*, 73 N. Y. 516; *Wyman v. P. M. L. Ins. Co.*, 119 id. 274; *Helme v. P. L. J. Co.*, 61 Penn. St. 107; 2 Herman on Estoppel, § 762; *Hyatt v. Clark*, 118 N. Y. 563; *Stillwill v. M. L. Ins. Co.*, 72 id. 385, 392; *In re Cooper*, 93 id. 207, 512; *Underwood v. Ins. Co.*, 57 id. 500; *Brink v. H. F. Ins. Co.*, 80 id. 108, 112; *Goodwin v. M. M. L. Ins. Co.*, 73 id. 480, 496; 1 Wood on Ins. 929; Pars. on Cont. 45; Herman on Est. § 1208; *Titus v. G. F. Ins. Co.*, 81 N. Y. 410-418; *Robey v. A. C. Ins. Co.*, 120 id. 510-517.)

FOLLETT, Ch. J. But three of the many issues raised by the pleadings were contested at Circuit: (1) Did the defendant unreasonably, and in bad faith, refuse to agree on an impartial person to act as umpire? (2) Is the defendant estopped by its conduct from asserting as a defense the fact that plaintiff failed to serve proofs of loss within sixty days? (3) The value of the property destroyed. The only questions argued in this court arise on the first and second of these issues, and are presented by the motion for a nonsuit made at the close of the plaintiff's evidence, renewed at the close of the evidence, by a motion to direct a verdict for the defendant, and by the exceptions to the charge and refusals to charge. The original agreement naming the appraisers was drafted by the general agent of the defendant, was signed by him in behalf of the company, and by the plaintiff, on the 21st of October, 1887, and was delivered to the defendant's agent and taken away by him. December thirtieth, Langworthy produced the appraisal contract at Medina, erased Headley's name, and inserted Nixon's in its place. On this occasion Langworthy named three persons, any one of whom he would accept as umpire, all of whom were unknown to the plaintiff and Nixon, and they were unwilling to accept of either. Nixon selected several persons whom he was willing to accept, but the two appraisers separated without agreeing upon an umpire, and they never reached an agreement. Langworthy would not accept of any

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person selected by Nixon, and Nixon would not of either of the three suggested by Langworthy. On the trial, considerable evidence was given tending to show that the persons selected by Langworthy had been frequently employed by insurers as appraisers and umpires, and it was insisted that the defendant, through its appraiser, Langworthy, refused to agree upon "a disinterested umpire." If this was true, the fact that an appraisal had not been made was not a defense to the action. (*Uhrig v. Williamsburgh City Fire Ins. Co.*, 101 N. Y. 362.) This question of fact was submitted to the jury under conservative instructions, and was found for the plaintiff. It cannot be said that there is no evidence in the record which tends to sustain this branch of the verdict. There was no error in the refusal of the court to charge in substance that the defendant was not bound by whatever Langworthy did, or failed to do, in respect to the selection of an umpire. Langworthy was the nominee of the defendant, and he owed a duty to select an umpire, and if he improperly neglected this duty, the consequences cannot be charged to the plaintiff. Under the evidence the court was not required to charge that Langworthy did not represent the defendant in the conduct of the appraisal.

Among other provisions contained in the policy, is a clause that the assured shall furnish proofs of loss to the insurer within sixty days after the fire, as is provided in lines 67 to 80 inclusive in the "Standard Fire Insurance Policy of the State of New York."

It is also prescribed by the Standard Policy: "This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required;" and it is now insisted that the defendant, not having waived in

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writing the performance of the stipulation, that proofs of loss should be furnished in sixty days, that no recovery can be had on the policy. A party to a contract, containing a provision that it shall not be modified or changed except by a writing signed by him, may by conduct estop himself from enforcing the provision against a party who has acted in reliance upon the conduct, and so the acts of an agent, who possesses the power of the principal, or who has been held out by the principal to possess his power, in respect to the provision alleged to have been altered or changed, may also estop his principal. (*Messelback v. Norman*, 122 N. Y. 578 ; *Underwood v. Farmers' Joint Stock Ins. Co.*, 57 N. Y. 500.) December 30, 1887, more than seventy days after the fire, the parties entered into a contract in writing to submit the question of the amount of the loss to appraisement, which was a waiver of the provision in the policy, that proofs of loss must be furnished within sixty days. The evidence warrants the inference that this contract to submit the amount of loss to appraisers was continually in the hands of defendant, from the date October twenty-first, when first executed, until the time of the trial, and that the negotiations were not unknown to it. In addition, the plaintiff and his wife testified without objection that when the general agent and appraiser of the defendant called to settle the loss and executed the appraisal agreement, he said that proofs of loss need not be furnished, as the damages would be soon appraised and settled. This was denied by the general agent. The plaintiff also testified without objection that defendant's local agent, who issued the policy, also told him after the fire that it would be unnecessary to furnish proofs of loss. This the local agent denied, but these issues were submitted to the jury and found for the plaintiff. Under such circumstances the question whether the defendant had waived the presentation of proofs of loss was properly submitted to the jury as a question of fact.

It may be remarked in passing that no defense on the merits was presented to the jury, the payment of the policy being resisted solely on the grounds that an appraisement had not

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been had, and formal proofs of loss had not been served within the time limited by the policy.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

HEDWIG BLAECCHINSKA, Respondent, v. HOWARD MISSION AND HOME FOR LITTLE WANDERERS, Appellant.

180	497
158	801

130	497
181	US 66

The provision of the act in relation to married women (Chap. 90, Laws of 1880, as amended by chap. 172, Laws of 1882), making the property a married woman "acquires by her trade, business, labor or services, carried on or performed on her sole and separate account," her separate property, does not apply to labor performed by her for her husband and she cannot make a binding contract with him for her services having no connection with a separate business and estate although the same are to be rendered outside of her household duties. While he cannot require her to perform services for him outside of the household, such services as she does render, whether within or without the strict line of her duty, belong to him, and a promise to pay therefor is simply a promise to make her a gift, and so is not enforceable.

In an action by a married woman to recover damages for injuries sustained through the alleged negligence of defendant, the plaintiff was permitted to testify, under objection, that before the accident she did the housework and worked for her husband as a seamstress, receiving from him a weekly salary, but because of the injury was no longer able to do this work. The court charged that if plaintiff was entitled to recover she could recover for the loss of wages she had sustained. *Held*, error; that plaintiff could recover actual damages only; and that the consequential damages for loss of her services, both in the house and as seamstress, could be recovered only in a separate action brought by her husband in his own name.

Brooks v. Schwerin (54 N. Y. 343), distinguished.

Blaechinska v. Howard Mission, etc. (56 Hun, 322), reversed.

(Submitted December 22, 1891; decided January 20, 1892.)

APPEAL from a judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made April 22, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

Opinion of the Court, per VANN, J.

The plaintiff, a married woman, brought this action to recover from the defendant, a charitable corporation, the damages that she claims to have sustained through its alleged negligence in maintaining a broken cover over a coal-hole in a public sidewalk, which caused her to fall and break her arm. The pleadings presented the usual issue as to the negligence of each party, and the jury rendered a verdict in favor of the plaintiff for five hundred dollars.

Further facts are stated in the opinion.

Horace H. Chittenden for appellant. In this action damages by reason of loss of wages which had been previously paid plaintiff by her husband for services cannot be recovered. (*Coleman v. Burr*, 93 N. Y. 17; *Filer v. N. Y. C. R. R. Co.*, 49 id. 47; *Whittaker v. Whittaker*, 52 id. 368; *Dawson v. City of Troy*, 49 Hun, 322.) These damages, to be recoverable, must be pleaded. (*Gumb v. R. R. Co.*, 114 N. Y. 411.)

Ezekiel Fixman for respondent. The testimony offered by plaintiff as to the receipt by her of wages was properly received, and the exception of defendant to its reception was not well taken. (Laws of 1860, chap. 90; *Reynolds v. Robinson*, 64 N. Y. 593.) A married woman, in an action for personal injuries, may recover for her loss of earnings arising out of her employment other than her household duties. (*Brooks v. Schwerin*, 54 N. Y. 343; *Birbeck v. Ackroyd*, 74 id. 356; *Reynolds v. Robinson*, 64 id. 593.) This court will not review the decision of a jury upon the facts. (*McGrath v. N. M. Bank*, 104 N. Y. 417.)

VANN, J. Upon the trial of this action the plaintiff testified that at the time she was injured she was living with her husband, a custom tailor, for whom she worked as a seamstress. She was then asked by her counsel: "Were you in receipt of a salary from him?" And under objection answered: "Yes, I received a salary of five and six dollars a week, and I did all the housework and now I can't do it and I must have help, I used to do very good tailoring, but I can't do it now." On

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her cross-examination she testified that she used the money thus earned by her for the children and the general support of the family. It did not appear that she had any separate estate or business. The court charged the jury that the plaintiff, if she could recover at all, was entitled "to recover for the loss of wages which she has sustained." The exceptions taken by the defendant to these rulings present the only question that we are asked to decide on this appeal. The learned General Term affirmed the judgment of the Circuit on the ground that the money which the plaintiff had been accustomed to receive from her husband for services rendered outside of her household duties, was her own property and that the loss of the salary could be given in evidence as an element of damage the same as if she had been working for a stranger. The only cases cited in support of this conclusion are *Brooks v. Schwerin* (54 N. Y. 343), and *Reynolds v. Robinson* (64 id. 589).

The enabling act of 1860 (L. 1860, ch. 90, as amended by L. 1862, ch. 172), makes separate property out of that which a married woman "acquires by her trade, business, labor or services, carried on or performed on her sole and separate account." As the husband is entitled to the services of his wife at common law, it has uniformly been held that the statute does not apply to labor performed by her for him in his household, even if it is of somewhat extraordinary character. (*Reynolds v. Robinson*, 64 N. Y. 589; *Coleman v. Burr*, 93 id. 17.)

But the husband's right to the services of his wife is not limited to those performed for him in his house, for when she works for him out of doors upon his farm, she is entitled to no pecuniary compensation, and his written promise to pay her therefor is without consideration. (*Whitaker v. Whitaker*, 52 N. Y. 368, 371.) When she works with her husband for another and their joint earnings are used to support the family, if there is no special contract that she is to receive the avails of her labor, they belong to him and he is entitled to recover their value. (*Birkbeck v. Ackroyd*, 74 N. Y. 356; *S. C.*, 11 Hun, 365; *Beau v. Kiah*, 4 id. 171.)

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Until recently the power of a married woman to make general contracts, not relating to labor to be "performed on her sole and separate account," depended upon the act of 1860, and the possession of a separate estate, or engagement in a separate business, was essential to their validity, although she might become liable through her representations by estoppel. (*Linderman v. Farquharson*, 101 N. Y. 434; *Frecking v. Rolland*, 53 id. 422; *Corn Exchange Ins. Co. v. Babcock*, 47 id. 613; *Bodine v. Killeen*, 53 id. 93.)

In 1884 her powers were amplified so that she may now enter into contracts to the same extent, with like effect and in the same form as if unmarried, whether such contracts relate to her separate estate or not, but this enlargement of her rights does not extend to any contract between herself and her husband. (L. 1884, ch. 381.)

She has further been authorized by statute to convey lands directly to and accept conveyances directly from her husband, without the intervention of a third person. (L. 1887, ch. 537.)

Under the act of 1860, she could contract with her husband in relation to her separate estate, for as to that she stood "at law on the same footing as if unmarried." (*Noel v. Kinney*, 106 N. Y. 74, 78; *Stanley v. Nat. Union Bank*, 115 id. 122; *Manchester v. Tibbetts*, 121 id. 219; *Suau v. Caffé*, 122 id. 308; *Third National Bank of Buffalo v. Guenther*, 123 id. 568; *Owen v. Cawley*, 36 id. 600; *Bodine v. Killeen*, 53 id. 93; *Frecking v. Rolland*, Id. 422; *Knapp v. Smith*, 27 id. 277; *Seymour v. Fellows*, 77 id. 178.)

The contract in *Hendricks v. Isaacs* (117 N. Y. 411) was doubtless regarded as not relating to the separate estate of the wife, and on this basis it is not in conflict with the authorities cited above.

But while she can thus contract with her husband with reference to her separate property, can she make a binding agreement with him as to her own services, to be rendered outside of her household duties and having no connection with a separate business or estate? In other words, can she hire out to him, to work in his store or factory, and compel him to pay

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the price agreed upon for her services? If she can, it follows that the plaintiff was entitled to her earnings under the contract that may be implied from the payment of wages to her by her husband, and her ability to earn having been impaired by the negligence of the defendant, the fact was properly proved before and submitted to the jury. Otherwise, the evidence objected to was improperly received, and it was error to instruct the jury that they might consider it in assessing the damages. As a man cannot make a valid contract to pay his wife for extraordinary services rendered in his household, or for working on his farm, how can he make a valid contract to pay her for helping him make clothes in his business as a custom tailor? What basis is there for any distinction? Does the statute, which so modified the common law as to give to the wife her earnings from her own labor performed on her "sole and separate account," contemplate that services for her husband can be performed on her "sole and separate account," unless they have some relation to a separate estate? Under the rule laid down in *Coleman v. Burr* and *Whitaker v. Whitaker* (*supra*), the words "sole and separate account," as used in the statute, cannot mean simply an election on the part of the wife to work for her own benefit, regardless of whom the work is done for. In those cases her election to work for herself, although manifest, did not take the contract out of the common-law rule. In deciding *Whitaker v. Whitaker*, the court used this significant language: "If a wife can be said to be entitled to higher consideration or compensation because she labors in the field instead of in her household * * * the law makes no distinction. It never has recognized the right to compensation from her husband on account of the peculiar character of her services." It seems to be the policy of the legislature, as indicated by recent enactments, to relieve every married woman of the disability of coverture in contracting with anyone except her husband. As to him, the restriction is continued, except that the formality of conveying real estate through the medium of a third person is no longer required. The object of the legislature was probably to protect the

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marital relation, as well as to prevent the perpetration of frauds upon creditors. Every experienced observer realizes that an unlimited right on the part of the wife to contract with her husband, would afford an easy cover for fraud and would be a perpetual menace to creditors.

The enabling statutes do not relieve a wife of the duty of rendering services to her husband. While they give her the benefit of what she earns, under her own contracts, by labor performed for anyone except her husband, her common-law duty to him remains and if he promises to pay her for working for him, it is a promise to pay for that which legally belongs to him. The fact that he cannot require her to perform services for him outside of the household does not affect the question, for he could not require it at common law. Such services as she does render him, whether within or without the strict line of her duty, belong to him. If he pays her for them it is a gift. If he promises to pay her a certain sum for them, it is a promise to make her a gift of that sum. She cannot enforce such a promise by a suit against him. We think the rule is well stated by a recent writer when he says that the enabling acts do not apply to the labor performed by a married woman "for her husband, or bestowed on his business, or in his household, or in his care, or in the care of his family, for in such cases it is her marital duty and he is not liable to pay for the services of his wife." (Kelly's Contracts of Married Women, 153.) These views are not in conflict with *Brooks v. Schwerin* (54 N. Y. 343). The plaintiff in that case, a married woman, lived with her husband, and took charge of the family. Having been injured by the negligence of the defendant she was allowed to show, under objection, on the trial of an action brought to recover damages therefor, that she had worked out and received ten shillings a day. The court refused to charge that she could not recover for her time and services while disabled. It was held by three out of the five commissioners who participated in the decision that the evidence was competent and that the request was too broad and was properly refused for that reason.

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The distinction between that case and this is that in the former the wife worked for a third person, while in the latter she worked for her husband. When she worked for a stranger, it was on her sole and separate account, and the enabling act protected her contract. When she worked for her husband, it was on his account and the statute did not apply.

In *Filer v. N. Y. Central Railroad Company* (49 N. Y. 47), a leading case upon the subject, it was held that a wife, not engaged in business or in performing labor on her sole and separate account, when injured by the wrongful act of another, could not recover consequential damages resulting from her inability to labor. The court said: "Her services and earnings belong to her husband and for the loss of such services, caused by the accident, he may have an action. * * * She is authorized to sue for any injury to her person or character, the same as if she were sole. This is for the direct injury and for direct and immediate damages, unless she is, on her own account and for her own benefit, engaged in some business in which she sustains a loss."

While we have considered, we have not cited, many cases that bear more or less directly upon the general subject, but have referred to such as declare, limit and illustrate the law relating to the capacity of a married woman to contract with her husband in relation to her own services. Applying the law, as we gather it from the statute and the manifold decisions, to the facts of this case as now laid before us, we think that the plaintiff is entitled to recover actual damages only and that the consequential damages for the loss of her services, both in the house and in the shop, should be recovered by her husband in a separate action brought in his own name. The damages for the injury to her person belong to her, because the statute has given them to her, but the damages for the loss of her services belong to him, because the common law gave them to him and the statute has not taken them away.

The judgment should be reversed and a new trial granted with costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

JOHN R. LENT et al., Respondents, v. NEW YORK AND
MASSACHUSETTS RAILWAY COMPANY, Appellant.

130	504
130	692

130	504
166	387

Facts material to a plaintiff's cause of action and essential to be proved to entitle him to a judgment must be pleaded.

No presumption can be indulged in that a defendant has failed in his duty or omitted to perform his contract obligation.

In an action upon an alleged indebtedness an allegation in the complaint of non-payment is essential.

This is not affected by the rule that payment must be pleaded as an affirmative defense, and cannot be proved under the general issue, but the rule simply modifies the general rule of pleading so that the averment of payment is not put in issue by a general denial.

To constitute a cause of action against a railroad company under the General Railroad Act (§ 18, chap. 140, Laws of 1850, as amended by chap. 198, Laws of 1876), to recover the amount of an award for land taken by it for railroad purposes, it is necessary that the final order confirming the award of the commissioners of appraisal, or a certified copy thereof, should be recorded in the county clerk's office.

An allegation, therefore, in the complaint in such an action of such recording is essential, so also is an averment that the defendant has failed to pay the award or is indebted to plaintiffs therefor.

The complaint in such an action alleged the incorporation of defendant, the presentation by it of a petition for the appointment of commissioners, their appointment and report of amount to be paid plaintiff, the confirmation thereof on defendant's motion, and that defendant subsequently appealed from said order to the General Term, where it was affirmed. Then followed a prayer for judgment for the amount of the award and costs. There was no allegation that defendant had failed or omitted to pay the award or was indebted to plaintiff. Defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action, and the demurrer was overruled. *Held*, error.

Salisbury v. Stinson (10 Hun, 242), overruled.

The complaint did not expressly allege that the order confirming the report of the commissioners had been recorded as required by said act to create a debt against defendant. It did allege, however, that the order had been "entered," and the paragraph closed with this clause: "To which order or its record plaintiffs beg leave to refer." *Held*, that the word "entered" was properly used as synonymous with "recorded;" and so, that the complaint in this respect was sufficient.

Lent v. N. Y. & M. R. Co. (55 Hun, 181), reversed.

(Argued October 20, 1891; decided January 26, 1892.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1889, which affirmed a judgment of the Special Term entered upon an order overruling a demurrer to the complaint.

This action was brought upon an award of commissioners of appraisal, appointed on application of defendant to appraise lands of John R. Lent, to be taken by defendant for railroad purposes.

The complaint alleges the incorporation of the defendant. The presentation to the Supreme Court pursuant to the statute of this state of a petition by said railroad company asking for the appointment of commissioners to ascertain and appraise the compensation to be made to plaintiff John R. Lent and others for certain real estate which said corporation desired to take for railroad purposes.

The appointment of commissioners and of Henry M. Taylor as special guardian for said Lent in said proceedings, and a report by said commissioners that the amount which ought to be paid to said Lent for said real estate was the sum of \$14,270, and to said special guardian for costs and expenses, the sum of \$300.

That said report was upon motion of the railroad company confirmed, and an order entered directing said company to pay said sums to said Henry M. Taylor, special guardian of said Lent. That subsequently said defendant appealed to the General Term from said order, and that said report and order had been upon such appeal duly affirmed. These allegations were followed by a prayer for judgment for the amount of the award and costs. The defendant demurred to the complaint upon the grounds :

(1) That the plaintiff had not legal capacity to sue. (2) That there was a non-joinder of parties plaintiff. (3) That there was a defect of parties plaintiff. (4) That causes of action were improperly united. (5) That the complaint did not state facts sufficient to constitute a cause of action.

Statement of case.

Robert F. Wilkinson for appellant. It appears on the face of the complaint that the plaintiff had no legal capacity to sue. (3 R. S. [8th ed.] 1743, § 14.) The demurrer should have been sustained, because the plaintiffs seek to recover in one complaint and in one action upon two distinct and separate causes of action, belonging to different persons, and different in kind. (*Hynes v. F. L. & T. Co.*, 31 N. Y. S. R. 136; 9 N. Y. Supp. 260; *Gray v. Rothschild*, 112 N. Y. 668; *Wood v. Perry*, 1 Barb. 114; *Mann v. Marsh*, 35 id. 68.) The complaint is fatally defective, because it contains no allegation of any breach of the defendant's contract or obligation to pay the amount of the award, or any neglect, omission or refusal by it to comply with the order confirming the award. (1 Chitty's Pl. 325; 2 Wait's Law & Pr. 318; *Witherhead v. Allen*, 4 Abb. Ct. App. Dec. 628, 634; *Van Geisen v. Van Giesen*, 12 Barb. 520; 10 N. Y. 316; *Keteltas v. Myers*, 19 id. 231-233; *Tracy v. Tracy*, 20 Civ. Pro. Rep. 98; *Merwin v. Hamilton*, 13 J. & S. 244, 253; *Moffet v. Sackett*, 18 N. Y. 522; *Betts v. Bache*, 14 Abb. Pr. 279, 284; *Cudlipp v. Whipple*, 11 J. & S. 610; Code Civ. Pro. §§ 420, 1212.) The complaint is also fatally defective because it does not allege compliance by the plaintiffs with certain provisions of the General Railroad Law, upon which their right of action depends. (3 R. S. [8th ed.] 1745, § 17; Laws of 1876, chap. 198; *In re R. & C. R. R. Co.*, 67 N. Y. 242; Code Civ. Pro. § 3374; Laws of 1866, chap. 546, § 15; Laws of 1871, chap. 560.)

Henry M. Taylor for respondents. An objection under section 488 of the Code must point out specifically the particular defect relied upon, "otherwise it may be disregarded"—and it is not sufficient to state them, without specifying the defect relied on. These grounds are not stated in compliance with section 490, and the objection should be disregarded. (Code Civ. Pro. § 490.) The cause of action in favor of John R. Lent, and the cause of action in favor of Henry M. Taylor, as special guardian of John R. Lent, have

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been properly united. (Code Civ. Pro. § 449; *Shepherd v. M. R. Co.*, 117 N. Y. 450.) The complaint states facts sufficient to constitute a cause of action. (*In re R. & C. R. R. Co.*, 67 N. Y. 242; 8 Hun, 35.) The claim that the amendment of May 6, 1876, to section 18 of the Railroad Act, has changed the effect of confirmation of the report, when made on motion of the railroad company, is not well founded. (2 R. S. [7th ed.] 1585, § 6.) The complaint properly alleges the confirmation of the report of the commissioners of appraisal on motion of defendant and the record of the order. (67 N. Y. 248; *Marie v. Garrison*, 83 id. 23; *Zabriskie v. Smith*, 13 id. 330.)

BROWN, J. It is provided by section seventeen of the General Railroad Act in reference to the taking of land for railroad purposes that upon the report of the commissioners of appraisal being made, the railroad company shall give notice to the parties to be affected by the proceeding for the confirmation of such report and the court shall thereupon confirm the same and make an order containing a recital of the substance of the proceedings, a description of the real estate, and a direction to whom the money shall be paid, or in what bank and in what manner it shall be deposited.

Prior to 1876 it was provided in section 18, that a certified copy of the order confirming the report should be recorded at full length in the clerk's office of the county in which the land described in the order was situated, and thereupon and upon payment or deposit of the sum to be paid as compensation for the land and for costs, etc., the title should vest in the company.

Under the section quoted this court decided in the *Matter of the Rhinebeck and Connecticut R. R. Co.* (67 N. Y. 242), that the confirmation of the report created reciprocal rights between the company and the land owner and put it beyond the power of the company thereafter to abandon the proceedings and that the order of confirmation operated as a judgment binding both parties. This result followed the conclusion drawn from the construction given the sections of the statute

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quoted, that from the date of the order confirming the report the duty of the company to pay the award was absolute, and that it was not necessary in order to conclude the corporation that the title to the land should have become vested in it.

By chapter 198, Laws of 1876, section 18 was amended by adding thereto the following: "If the company shall neglect to have such order recorded and make the payment or deposit as herein provided, for the period of ten days after the date of such order, any party to such proceedings and interested therein may, at his election, cause a certified copy of the order to be recorded as aforesaid, and thereupon the moneys therein directed to be paid, with interest thereon from the date of said order, shall be a debt against the company, and the same shall be a lien on such real estate, and may be enforced and collected by action at law or in equity in the Supreme Court, with costs.

"Except, nevertheless, the company may abandon such proceedings by filing within thirty days after notice in writing of such recorded order, in the office of such clerk, a notice of its determination to do so, and paying the reasonable costs and expenses of such party to be ascertained and adjusted on motion by the court making such order. But, in case of such abandonment, the company shall not renew proceedings to acquire title to such lands, without a tender or deposit in the court of the amount of said award and the interest thereon."

This amendment effected a material change in the law in respect to the question raised upon this appeal.

The company was no longer concluded by the order confirming the report. Their duty to pay did not then arise nor did their right to discontinue the proceedings then cease. The duty to pay as well as the land owner's right to sue for the award was made to depend upon the recording of the order.

"Thereupon" is the language of the act; that is upon the recording of the order "the moneys therein directed to be paid * * * shall be a debt against the company and the same shall be a lien upon such real estate and may be collected by action at law or in equity in the Supreme Court."

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And the right to discontinue the proceedings did not end until thirty days after recording of the order, or thirty days after notice in writing that it had been recorded by some other party to the proceedings.

Under the section as amended, title to the land vested in the corporation upon the recording of the order and payment or deposit of the award. But no debt was created against the corporation until the order was recorded, and if the company neglected to have that act performed, any other party to the proceedings could cause it to be done, and thereby establish the company's liability to pay the award.

It follows that no cause of action existed against the corporation in favor of the land owner for the amount of the award until the original or a certified copy of the order was recorded, and hence an allegation of that fact was essential in the complaint.

The complaint, while it did not expressly allege that the order had been recorded, did state that it had been "entered," and we are of the opinion that this term was used by the pleader as synonymous with the word recorded. This is manifest by the last line of the paragraph "to which order or its record plaintiffs beg leave to refer."

The words "entered" and "entry" are frequently used as synonymous with "recorded" in the law books. (Code C. P. § 1236). All through the statutes, Code and rules, the word "filing" describes the indorsement on a paper of the date when left in a public office, not for record, but for safe keeping. The word "entry" or "entered" describes the duty of a public officer when something more is required than filing. When we speak of entering a satisfaction of judgment we mean that the "satisfaction piece" or execution is filed and the appropriate words written in the docket indicating that it has been paid. If one should plead that a satisfaction of judgment had been duly entered it would imply that the clerk had done his whole duty. The law requires orders made on notice and in special proceedings to be entered, that is, recorded in an order book. Judgments are to be entered — recorded — in a

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judgment book. If a pleader should aver that a judgment or order had been duly entered, I think it would be held on demurrer to be equivalent to averring that the judgment or order had been recorded, that the clerk had done his whole duty.

It remains to consider the question, whether giving to the word "entered" the interpretation that we have, the complaint states a cause of action. The effect of the recording of the order was to create a debt against the defendant, and in that respect its liability is analogous to a liability arising upon the maturity of a contract for the payment of money, and the question is presented whether an allegation of non-payment is essential and material to the cause of action.

The Code (§ 481) provides that a complaint must contain a plain and concise statement of the facts constituting the cause of action and the general rule deduced therefrom is that whatever facts are essential to be proven to entitle the plaintiff to recover upon the trial must be alleged in the complaint.

It does not admit of controversy that upon an ordinary contract for the payment of money, non-payment is a fact which constitutes the breach of the contract and is the essence of the cause of action, and being such within the rule of the Code it should be alleged in the complaint. It is said, however, that payment is always an affirmative defense which must be pleaded to be available, and hence non-payment need not be alleged, as it is not a fact put in issue by a general denial. (*Salisbury v. Stinson*, 10 Hun, 242.)

The rule that payment is an affirmative defense is not one embodied in the Code, but had its origin under the common-law practice in the plea of non-assumpsit, and the reason for it was that in assumpsit the allegation in the declaration and the traverse in the plea were in the past tense, and under the rule which excluded all proof not strictly within the issue, no evidence was admissible, except such as had a tendency to show that the defendant never had made the promise.

It was never applied in the action of debt, the allegation in that form of action being in the present tense, and under the

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plea of *nil debet* any fact tending to show that there was no indebtedness on the part of the defendant was admissible.

The history of the rule is set forth in Judge SELDEN's opinion in *McKyring v. Bull* (16 N. Y. 297), and need not be referred to here.

Following the rule thus established under the former practice the courts have uniformly held since the adoption of the Code that payment must be pleaded and cannot be proven under the general issue.

While the effect of these decisions is to modify somewhat the rule embodied in section 500 of the Code, their tendency is to simplify pleading, as under their application the plaintiff is informed of the precise defense intended to be made, and thus unnecessary preparation is obviated, and surprise on the trial avoided.

But there is no need to further extend the rule, and hold that, because payment as a defense must be pleaded, the breach of the agreement need not be alleged in the complaint. That would have the contrary effect and lead to embarrassments that are avoided when the plain provisions of the Code are followed.

No authority exists, so far as I am able to find, except the case of *Salisbury v. Stinson*, holding that a breach of the contract need not be pleaded, but all text writers and reported cases hold to the contrary. (1 Chitty P. pp. 325-359; Comyn's Digest, Title Pleader C. 44; 2 Wait's Law & Practice, p. 318; 1 Wait's Actions & Defenses, pp. 394, 395, and cases cited; *Witherhead v. Allen*, 4 Abb. Ct. Ap. Dec. 628; *Tracy v. Tracy*, 35 N. Y. State Rep. 167; *Van Giesen v. Van Giesen*, 10 N. Y. 316; *Krower v. Reynolds*, 99 id. 245.)

Witherhead v. Allen arose upon a demurrer to a complaint. The opinion states the rule as follows: "When the action is founded upon the contract obligation or duty of the defendant, the very gist and essence of the cause of action is the breach thereof by the defendant, and unless a breach is alleged no cause of action is shown."

In *Van Giesen v. Van Giesen* (10 N. Y. 316), it is said:

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“The material allegations of the complaint in this case are the making by the defendants of the promissory note, the transfer of it to the plaintiff, and the non-payment by the defendants. Each of them is material, for without the concurrence of all of them, the complaint would not show a cause of action.”

To the same effect is *Keteltas v. Myers* (19 N. Y. 231). See also Code, §§ 534, 1213, subd. 2.

In *Krower v. Reynolds*, it was held in an action on a covenant to pay a mortgage, that it was necessary to allege that the mortgage had not been paid, or that the defendant had failed to perform his covenant, and without such allegation the complaint was demurrable.

And in numerous cases, which need not be cited, but of which *Allen v. Patterson* (7 N. Y. 476) is a type, the rule is recognized by implication, but the complaints were held good because of an allegation of indebtedness by the defendant to the plaintiff. This rule is further recognized in section 534 of the Code, which provides a simple form of pleading on an instrument for the payment of money only, but requires the plaintiff to state the sum which he claims to be due to him thereon. Again, the complaint, when verified and there is no answer, stands as proof of the plaintiff's claim, and the clerk is authorized to enter judgment thereon.

But if the plaintiff is not required to allege a breach of the contract, or state the amount due, as his verification would cover only the facts alleged, the clerk, under sections 420, 1212 and 1213 of the Code, would be authorized to enter judgment for the whole amount called for by the contract, and this without proof of the amount due thereon. This would be contrary to the whole spirit of the Code, and would require the clerk to presume a fact neither alleged or proved, viz., that no payments had been made.

These views show how essential to the practice it is that the plaintiff should allege the breach of the contract of which he complains. That breach is always a fact, and is of the very essence of the cause of action. The complaint should show such facts which, if verified and not denied, prove to the clerk

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that the plaintiff is entitled to judgment for the amount he demands.

It cannot be said that where the breach consists in non-payment of an agreed sum that it is not an issuable fact because payment cannot be proven under general denial. The most that can be said is that that form of denial does not put that fact in issue, and to that extent the rule that payment must be pleaded must be deemed to modify the rule of pleading under the Code in reference to a general denial.

But no reason is apparent how it can justify the omission from the complaint of a fact material to the plaintiff's cause of action, and essential to be proved to entitle the plaintiff to a judgment. Such facts, under the Code, must be pleaded. No presumption can be indulged in that a defendant has failed in his duty, or omitted to perform his contract obligation.

There was no allegation in the complaint in this action that the defendants had failed or omitted to pay the award, and no allegation of indebtedness, and without such no cause of action was stated.

On this ground we are of the opinion the demurrer was well taken.

Other objections to the complaint were discussed upon the argument, but none of them are considered well taken.

The judgment should be reversed and the demurrer sustained, with costs, with leave to the plaintiff to amend the complaint within thirty days on payment of costs.

All concur, except FOLLETT, Ch. J., and VANN, J., dissenting.
Judgment reversed.

Statement of case.

130 514
145 104

CHARLES BLOOD, Respondent, v. SARAH S. KANE, Appellant.

130 514
78 AD'598
78 AD'614

An executor, as such, takes the unqualified legal title to all personalty not specifically bequeathed, and a qualified legal title to that which is so bequeathed, and holds as trustee for the benefit of, first, his testator's creditors; second, of the distributees under his will, or, if the whole is not bequeathed, under the Statute of Distributions.

The trust estate of a sole executor, who is also the sole devisee and legatee, is solely for the benefit of the testator's creditors; when they are paid, that estate sinks into and is merged with the beneficial interest and he as devisee and legatee becomes vested with the legal title.

Upon proof, therefore, that all the debts of the testator have been paid, an executor, who is sole legatee, may avail himself of a chose in action belonging to the estate, as a counter-claim in an action against him.

In an action by an undertaker to recover articles furnished and services performed in the burial of defendant's testator, defendant set up as a counter-claim an indebtedness of plaintiff to her testator, which was greater than the amount in suit, and asked for judgment for the excess. Defendant was the sole legatee and devisee under, and executrix of, the will. It was admitted that no notice to creditors to present claims had been published. Defendant testified that her testator owed very few debts when he died, and that she had paid those debts. She then offered to prove the counter-claim. The evidence was rejected, the referee ruling that the testator's claim was not available as a counter-claim or set-off. *Held* (BRADLEY and PARKER, JJ., dissenting), error; that defendant was entitled to show, by common-law evidence, that all the testator's debts had been paid, and, having established that fact, was entitled to have the amount of plaintiff's indebtedness allowed as a counter-claim.

Blood v. Kane (52 Hun, 225), reversed.

(Argued October 27, 1891; decided January 26, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 26, 1889, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Walter W. Holt for appellant. The decision of the court that until the defendant had a settlement of her accounts as

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executrix in Surrogate's Court, and a decree of the surrogate has been made discharging her, she holds the personal estate, including the accounts, as executrix and not as owner, was error. (*Fox v. Burns*, 12 Barb. 677; *Vedder v. Saxton*, 46 id. 188; *Shelden v. Bliss*, 4 Seld. 31; *Bull v. Church*, 5 Hill, 206; 2 Den. 430; *Sherman v. Willett*, 42 N. Y. 146; *Lutch v. Wells*, 48 id. 585; *O. T. & D. Co. v. Price*, 67 id. 542; *McClanahan v. Davis*, 8 How. [U. S.] 170.) Defendant could change the title from herself as executrix to herself individually. (*Matheson v. Grant*, 2 How. [U. S.] 263; *Livingston v. Newkirk*, 3 Johns. Ch. 312; *Hudson v. Reeve*, 1 Barb. 89; *Dubois v. Doubleday*, 9 Wend. 217; *Kirby v. Potter*, 4 Ves. 748; *Barlow v. Meyers*, 3 Hun, 720; 2 R. S. 354, § 17; Id. 87, §§ 27, 28; Code Civ. Pro. §§ 111, 112; *Howard v. Heinerschit*, 16 Hun, 177; *Brander v. Faulkner*, 34 N. Y. 347; *Stall v. Wilbur*, 77 id. 158.)

L. F. Stearns for respondent. The exceptions to the referee's findings of fact and conclusions of law are unavailing. (Code Civ. Pro. §§ 992, 993; *Tracy v. Frost*, 32 N. Y. S. R. 907; *Ferrin v. Myrick*, 41 N. Y. 315.) Neither executors nor administrators have authority to create an original liability on the part of the estate, or enter into an executory contract binding upon or enforceable against it. (*Van Cott v. Prentice*, 35 Hun, 320; *Ramsey v. Wandell*, 32 id. 85; *Murphy v. Hall*, 38 id. 529; *Wetmore v. Porter*, 92 id. 82; *Barry v. Lambert*, 98 id. 308.) The case shows no error committed by the referee in rejecting proof of a counter-claim, for the counter-claim set forth in the answer did not tend to diminish or defeat the plaintiff's recovery. (Code Civ. Pro. §§ 501, 505, 1814, 2734; *In re Hill*, 17 Abb. [N. C.] 273; *Barlow v. Myers*, 27 Hun, 286; *Thompson v. Whitmarsh*, 100 N. Y. 35; *Wakeman v. Everitt*, 41 Hun, 278; *Patterson v. Patterson*, 59 N. Y. 574; *Wilcox v. Smith*, 26 Barb. 316; *In re Butler*, 38 N. Y. 400; *Sherman v. Paige*, 85 id. 128; *Mayo v. Davidge*, 44 Hun, 342; *Moody v. Steele*, 11 Civ. Pro. Rep. 205; *Rice v. O'Connor*, 10 Abb. Pr. 362; *Heidenheimer v.*

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Wilson, 31 Barb. 636; *Wisner v. Ocompaugh*, 71 N. Y. 113.) The account set forth in the counter-claim in the answer was not specifically bequeathed to the appellant by the will of James Kane. (*Humphrey v. Robinson*, 52 Hun, 203, 204, 205; *Pierrepont v. Edwards*, 25 N. Y. 128; *Davis v. Crandall*, 101 id. 311.) The Surrogate's Court having acquired jurisdiction of the estate of James Kane, deceased, and that estate never having been judicially settled in that court and a decree made discharging the executrix, the County Court would not assume jurisdiction to determine the title of the defendant to the subject-matter of her counter-claim. (Code Civ. Pro. §§ 1848, 2472; 1 Pom. Eq. Juris. § 349; *Chipman v. Montgomery*, 63 N. Y. 235; *Anderson v. Anderson*, 20 N. Y. S. R. 344; *Walton v. Walton*, 1 Keyes, 17; *Hard v. Ashley*, 117 N. Y. 606.)

FOLLETT, Ch. J. December 5, 1883, James Kane died, leaving a will, by which he devised and bequeathed his entire estate to his widow, the defendant, and appointed her sole executrix. On the seventeenth of that month the will was probated and letters testamentary issued to her. The defendant employed the plaintiff, an undertaker, to take charge of the funeral and burial of her testator, for which she agreed to pay him \$85. In January, 1885, the plaintiff rendered other service for the defendant, of the value of \$10, as found by the referee. November 24, 1885, this action was begun to recover those sums. The defendant set up by way of counter-claim that the plaintiff was indebted in the sum of \$178.10 to her testator for services rendered by him in his life-time. On the trial the defendant admitted that the Surrogate's Court had made no order directing the publication of notice to creditors to present their claims, and that no notice had been published, but testified: "James Kane owed very few debts when he died; I paid those debts; there are no debts on his books owing by him which remain unpaid that I know of." She offered to prove the claim and asked that it be allowed: (1) As a counter-claim, and that she be given a judgment for the

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excess. (2) As a set-off against and in extinguishment of the plaintiff's claim for \$85, the agreed price for the burial of her husband. The evidence was rejected, and the referee ruled that the claim, which accrued to her testator, was not available as a counter-claim, nor as a set-off, to which ruling an exception was taken, and which presents the only question to be reviewed.

An executor, as such, takes the unqualified legal title of all personalty not specifically bequeathed, and a qualified legal title to that which is so bequeathed. He holds not in his own right, but as a trustee, for the benefit (1) of the creditors of the testator, and (2) of those entitled to distribution under the will, or if not all bequeathed, under the Statute of Distributions.

As to the chattels and choses in action specifically bequeathed, an executor has but a qualified title, the right to apply them in discharge of debts after first exhausting all other property applicable to that purpose. If he assents to their delivery to the legatees they acquire a perfect legal title to the article or demand, and in case the remaining property of the testator is insufficient to pay his debts the recipients of the specific legacies are liable under the statute to pay the amount or value of the legacies received by them.

The title of one who takes the entire estate under a will stands on the same footing, and is just as absolute, and he, with the assent of the executor, can recover in his own name a chose in action, or make it available by way of counter-claim.

The trust estate of a sole executor, who is also the sole devisee and legatee, is solely for the benefit of the testator's creditors, and when they are paid the trust estate sinks into and is merged with the beneficial interest, and the sole devisee and legatee becomes vested with the legal title of all the testator's estate.

Mr. Preston, in discussing this subject in his learned treatise on Conveyancing, says (Vol. 3, 310): "On the continuance of the privilege from merger, an observation which will be properly introduced into this place, presents itself. Though a person is originally entitled to a term, or to an estate of freehold, as an executor or administrator, yet in process of time

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he may become the owner of that estate in his own right. This happens in the case of executors, when the executor is also residuary legatee, and he performs all the purposes of the will, and holds the estate as legatee, or when the executor pays money of his own to the value of the term in discharge of the testator's debts, and with an intention to appropriate the term to his own use in lieu of the money. And in the case of administrators, when the administrator is the only person entitled to the beneficial ownership of the intestate's property, or procures a discharge from those who are to share that property with him, and all the debts of the intestate are paid. Under these and the like circumstances the executor or administrator will have the estate in his own right, and when he has the estate in his own right it will be subject to merger.

"Generally speaking, it is difficult to ascertain when the character of executor or administrator ceases, and the ownership, independent of that character, commences. Every case must depend on its own circumstances. This conclusion only is certain, that when the executor or administrator ceases to hold the estate in that character, he will hold the same in his own right, and it will be subject to merger. The burthen of proof lies on the executors or those persons who claim title under him."

This statement of the rule is quoted with approval in Williams on Executors (6th Am. ed. vol. 1, 642), and at page 649 that learned author says:

"As an executor, who is also a legatee, may, by assenting to his own legacy, vest the thing bequeathed in himself in the capacity of legatee, so an administrator, who is also entitled to share in the residue as one of the next of kin under the Statute of Distribution, may acquire a legal title, in his own right, to goods of the deceased, either by taking them by an agreement with the parties entitled to share with himself under the statute, or, even without such agreement, by appropriating them to himself as his own share." (3 Red. Wills [3d ed.], 131-133, p. 6; Schouler Ex. and Adm. §§ 242, 246, 248; 1 Woerner's Law of Adm. § 453.)

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It has been quite recently held by the House of Lords (*Cooper v. Cooper*, L. R. [7 Eng. & Ir. App.] 53), that "The rule of the Statute of Distributions, which requires the conversion of an intestate's estate into money, is introduced simply for the benefit of creditors, and the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin (subject only to the claims of creditors) is complete."

It is a universal rule that when the purpose of a trust has been fully accomplished, the title or estate of the trustee is at an end, and if he is also entitled to the beneficial estate, the two estates meeting in the same person are merged, and he becomes vested in his own right with the entire interest in the property.

It follows from these views that the defendant was entitled to show by common-law evidence that all of the debts of the testator had been paid, and that fact being established, the defendant was entitled to have the sum due her testator allowed as a counter-claim.

The judgment should be reversed and a new trial granted, with costs to abide event.

BRADLEY, J. (dissenting). There was no controversy about the plaintiff's claim for furnishing casket and hearse for, and attending the burial of, the body of the defendant's deceased husband, and for services in the burial of the body of her brother.

The questions for consideration arose upon exceptions taken to the exclusion of evidence offered in support of the matters alleged as counter-claim. The defendant's husband left his will by which, after payment of his debts, he devised and bequeathed all his estate, real and personal, to her, and nominated her to be executrix. The will was admitted to probate and letters testamentary issued to the defendant in 1883, and this action was commenced in 1885.

She had not been discharged from her relation as executrix. There had been no settlement in Surrogate's Court of her

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accounts as such. No order had been made for notice to creditors, nor had any notice to them been published. But she testified that the testator owed only a few debts; that she had paid them, so far as they had come to her knowledge; and that none appearing on his books remained unpaid. The alleged counter-claim was an indebtedness of the plaintiff, due and payable to her testator at the time of his decease, which she also alleged was owned by her. And the evidence offered to prove that claim against the plaintiff was excluded and exception taken. The question presented is whether this evidence was available to the defendant for the purposes alleged. She, as executrix, represented the person of the testator, and as such representative she became vested with title to all his personal estate as of at the time of his death. (*Schultz v. Pulver*, 11 Wendell, 363.) And the plaintiff's cause of action, so far as related to the burial expenses of her deceased husband, having arisen after the death of the testator, was one against the defendant personally, although she would be entitled to reimbursement from the estate. (*Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Munro*, 47 id. 366.) The apparent situation, until something should appear to change the relation of the defendant from that of personal representative of the testator in respect to personal estate to that of individual owner, would be that she held it in the capacity in which she took it. She so received it as executrix only. If the claim against the plaintiff had been the subject of specific bequest or legacy to her, then she could, by her mere assent to that effect, be deemed to have personally taken title to it under the will. (*Henderson v. Reeve*, 1 Barb. 89; *Doe v. Guy*, 3 East. 120.) In such case the legacy is subject to ademption, and it is not chargeable with the payment of debts of the testator unless there is a deficiency of other assets for that purpose. (*Parrott v. Worsfold*, 1 Jac. & Walk. 574; *Kirby v. Potter*, 4 Ves. 748; *Giddings v. Seward*, 16 N. Y. 365; *Newton v. Stanley*, 28 id. 61.) But the bequest to her of all the personal estate was not a specific one. It was a general bequest. (2 Williams on Exrs. 1054; *Tiff't v. Porter*, 8 N. Y. 516; *Briggs v. Hos-*

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ford, 22 Pick. 288.) And, therefore, the defendant, individually, could only through the execution of the will take title to the personal estate. This had not been accomplished when the action was commenced. Her representative relation and title in her as executrix to such estate do not appear in any manner to have been terminated. The question arises whether she could be permitted to effectually assert in her behalf, personally, as a counter-claim or set-off, the plaintiff's indebtedness, which constituted part of the personal estate taken by her as executrix. It would not be permissible to set off or counter-claim a claim held by her as executrix in an action against her personally, which is the character of the cause of action alleged in the complaint, as it arose after the decease of her testator. (*Buckland v. Gallup*, 105 N. Y. 453.) The requisite mutuality is there wanting. This rule, in its application to the question here as it existed before the Code, has not been changed by it. (Code, § 501; *Patterson v. Patterson*, 59 N. Y. 574; *Jordan v. N. S. & L. Bank*, 74 id. 467; *Thompson v. Whitmarsh*, 100 id. 35.) But it is urged that by setting up the indebtedness of the plaintiff, the defendant effectually elected to treat it as belonging to her individually, and that she could thus appropriate it, inasmuch as the personal estate was bequeathed to her. In other words, that she might at pleasure, by her mere desire to so treat it, throw off her relation of executrix to the title and assume that of individual owner. It is true she, as executrix, could sell or assign the property, and thus vest title in another; and whether, as executrix, she could have assigned the claim against the plaintiff to herself personally, it is unnecessary to inquire, as it is neither alleged nor made to appear that she did so. Her alleged right to it for the purpose of a counter-claim in this action is evidently based upon the general bequest to her after payment of the debts. The right of the defendant to make her claim available seems to be dependent upon the proposition that she may, by mere assent or assumption on her part, be treated as having title individually to the personal estate bequeathed by the will. As the trust and

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beneficial relation to the property existed in the same person it may be assumed that the defendant by the assent of the executrix sought to appropriate the claim against the plaintiff for the purpose which it is alleged by her in this action. But it is not seen how the representative could in that manner be divested of title and the individual invested with it. The former took the legal title to the personal estate with power of disposition of it, and the latter as beneficiary takes legal title to the estate or the fund produced by it through the execution of the will. In the view taken there seems to have been no evidence of counter-claim offered having the support of legal title to it in the defendant.

If it had appeared that the executrix had paid all the debts of her testator it may be that a different question than now arises would have been presented, as in practical effect the right of the defendant to the property as beneficiary was subject only to the payment of the debts of her testator. But the evidence did not warrant the conclusion that the debts left by him had been paid. There is a way provided by the statute for a personal representative of a decedent to ascertain *prima facie* the debts which the latter owed at the time of his decease. This may be done pursuant to order by notice to creditors to present their claims, and when the requisite time for doing so has elapsed such personal representative may for the purposes of the execution of the trust treat as existing no debts for him to pay other than those which have been presented. Then the right to the residue after payment of such debts presumptively is in the beneficiary of the will. In the present case there was no evidence tending to prove that all the debts of the testator had been paid. The fact that the executrix had paid all the debts of which she had been advised did not warrant the conclusion that none other remained unpaid.

In the cited cases of *Onondaga Trust & D. Co. v. Price* (87 N. Y. 542), there was a specific legacy given by the will and taken by the legatee with the assent of the executors. In *Barlow v. Myers* (3 Hun, '720; 64 N. Y. 41), the defendant, who was executrix of the will of her deceased husband, was

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charged personally with liability upon a cause of action arising in a matter relating to the estate after the death of her testator. She set up as counter-claim a negotiable promissory note, available as such if owned by her. And the view of the court was that if the note was held by her when the action was commenced it was a proper set-off unless she held it as executrix, which could not without evidence to that effect be assumed. On review of a subsequent trial of the same case (24 Hun, 286) the note was held available to the defendant as a counter-claim because it was negotiable. But the court went further and added that such right existed in the defendant because she took title to it as part of the residuary estate bequeathed to her by the will. This last remark does seem to have been essential to the result in the view there taken by the court. The facts which the defendant sought to prove in the present case would not establish in her individually a right or cause of action upon the claim against the plaintiff. They would not have been effectual to constitute a counter-claim or set-off at law, which is the only view that can be taken of it as alleged in this action.

It follows that the exclusion of the evidence was not error ; and that the judgment should be affirmed.

All concur with FOLLETT, Ch. J., except BRADLEY and PARKER, JJ., dissenting.

Judgment reversed. _____

ELIZA JANE MOORE, Appellant, v. THE NEW YORK ELEVATED
RAILROAD COMPANY et al., Respondents.

The theory upon which an action at law may be supported against an elevated railroad company by an abutting owner upon a street through which it runs, is that it is in such sense a trespasser or wrong-doer as to be liable to such owner for all the injuries resulting proximately from the wrongful act of maintaining and operating its road.

The continued invasion of the privacy of the occupant of a building, where it has the effect to reduce the rental value is such an injury, and for the damages so resulting the company is liable.

While the looking in at the windows of a dwelling, by the patrons and employes of an elevated railroad company, from its platform and the

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stairs leading to the same, is not the act of said company, as the latter furnishes the means and opportunity and by its invitation and procurement for the purpose of its business, brings those persons where they can thus invade the privacy of said dwelling, it is liable for the damages thus occasioned.

(Argued December 10, 1891; decided January 26, 1892.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city and county of New York, entered upon an order made February 3, 1890, which affirmed a judgment in favor of defendants entered upon a verdict and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Stanley W. Dexter for appellant. The court erred in instructing the jury to exclude the element of noise from their consideration in assessing the damage. (*Kane v. M. R. Co.*, 125 N. Y. 164; *Jones v. M. E. R. Co.*, 39 N. Y. S. R. 177; *Bruen v. M. R. Co.*, Id. 86; *Isaacson v. N. Y. C. & H. R. R. Co.*, 94 N. Y. 278; *Pearce v. Langfit*, 101 Penn. St. 512; *Gilbert v. F. & P. M. R. Co.*, 51 Mich. 488.) The court erred in instructing the jury to exclude the elements of vibration and loss of privacy from their consideration in assessing the damages. (*Duke of Buccleugh v. Metropolitan Board*, L. R. [5 H. L. Cas.] 418; *B. & P. R. R. Co. v. F. B. Church*, 108 U. S. 317, 335; *Bostock v. N. S. R. Co.*, 5 DeG. & S. 584; *Walker v. Brewster*, L. R. [5 Eq.] 25; *Inchbald v. Robinson*, L. R. [4 Ch. App.] 388; *Rex v. Moore*, 3 B. & Ad. 184.) In cases of misdirection by the court the inquiry is not whether the jury were actually misled by the instructions given, but whether the instructions were calculated to mislead them. (*Benham v. Cary*, 11 Wend. 83; *Erben v. Lorillard*, 19 N. Y. 299; *Lane v. Crombie*, 12 Pick. 177; *Wardell v. Hughes*, 3 Wend. 418; *Wilson v. Rastall*, 4 T. R. 758.) The court erred in excluding the evidence of a tenant who had left the premises as to the reason of her leaving. (*McKown v. Hunter*, 30 N. Y. 628; *Sweet v. Tuttle*, 14 id. 465; *Bank v. Kennedy*,

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17 Wall. 27.) Under any aspect of the case the plaintiff was entitled to nominal damages; and the right to the street easements being in question, a new trial will be granted, as a property right is affected. (*Hyatt v. Wood*, 3 Johns. 239; *Herrick v. Stover*, 5 Wend. 580; *McConihe v. N. Y. E. R. R. Co.*, 20 N. Y. 495; *Dean v. M. E. R. Co.*, 119 id. 540; *Kelly v. N. Y. & M. B. R. R. Co.*, 81 id. 233; *Bruen v. M. R. Co.*, 39 N. Y. S. R. 86; *Jones v. M. E. R. Co.*, Id. 177; *Dinehart v. Wells*, 2 Barb. 232; *Horton v. Jordan*, 32 N. Y. S. R. 920; *Crowell v. Smith*, 35 Hun, 182.)

Brainard Tolles for respondents. There are no valid exceptions to the admission or exclusion of evidence. (*Hess v. Blakeslee*, 2 N. Y. S. R. 311; *Bayliss v. Cockroft*, 81 N. Y. 371; *Dillon v. Anderson*, 43 id. 236; *McGean v. M. R. Co.*, 117 id. 219; *In re N. Y. E. R. R. Co.*, 40 N. Y. S. R. 147.) It was not error to instruct the jury that plaintiff could not recover damages occasioned by a change in the character of the neighborhood, even though caused by the construction of defendants' railroad. (*In re Ingraham*, 64 N. Y. 310; *Greene v. N. Y. C. R. R. Co.*, 12 Abb. [N. C.] 149; *Tallman v. M. E. R. R. Co.*, 121 N. Y. 119; *S. A. R. Co. v. M. E. R. Co.*, 56 Hun, 182; *Dorland v. R. R. Co.*, 46 Penn. St. 520; *Hatfield v. C. R. Co.*, 33 N. J. L. 251.) There was no error in the charge on the subject of noise and vibration. (*People v. Guidici*, 100 N. Y. 509; *Doyle v. N. Y. E. & E. Infirmary*, 80 id. 631; *Chipman v. Palmer*, 9 Hun, 517; 77 N. Y.—; *Groat v. Gile*, 1 id. 431; *Oldfield v. N. Y. & H. R. Co.*, 14 id. 310; *Jones v. Osgood*, 6 id. 233; *Haggart v. Morgan*, 5 id. 422; *Caldwell v. Murphy*, 11 id. 416; *Decker v. Matthews*, 12 id. 313; *Stone v. W. T. Co.*, 38 id. 240; *Willets v. S. M. Ins. Co.*, 45 id. 45; *Magee v. Badger*, 34 id. 247; *Sanford v. Crocheron*, 8 Civ. Pro. Rep. 146; *Hochreiter v. People*, 2 Abb. Ct. App. Dec. 303.) The sufficiency of the evidence to support the verdict is a question not raised by the record, but if it were the decision of the court below in that regard is correct. (*Schwinger v. Raymond*, 105 N. Y. 648;

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Rundell v. Butler, 10 Wend. 119; *Ellsler v. Brooks*, 22 J. & S. 73; *Reading v. Gray*, 5 id. 79; *Brantingham v. Fay*, 1 Johns. Cas. 255; *Hyatt v. Wood*, 3 Johns. 239; *Devendorf v. Wert*, 42 Barb. 230; *Jennings v. Loring*, 5 Ind. 250.)

BRADLEY, J. The plaintiff, life tenant of a house and lot at the north-east corner of Greenwich and Franklin streets in the city of New York, brought this action to recover damages alleged to have been suffered by her by the maintenance and operation of the New York Elevated Railroad (of which the Manhattan Ry. Co. was the lessee), in Greenwich street in front of her premises, and the erection and maintenance of a station for passengers to go onto and depart from the cars, which station was near to the plaintiff's house, in front on Greenwich street, and on Franklin street, into which it extended. The plaintiff gave evidence tending to prove some disturbance of her easements of light, air and access by the railroad and its use. She also gave some evidence of noise produced by it and of the loss of privacy in the use of the third story of the building. It appeared that the rental value of the plaintiff's premises had depreciated since the railroad was constructed. And evidence on the part of the defendants was to the effect that in that neighborhood the depreciation of rents was occasioned by the removal of the business stand of the Long Island farmers from there to Gansvoort market, thus diverting the trade incident to that traffic from the former to the latter place. The court submitted to the jury the question whether the rental value of the plaintiff's premises had been diminished by deprivation of light, air and access through the maintenance and operation of the road, and directed them to exclude from their consideration the elements of noise, vibration and the loss of privacy, for which they could allow no damages. The plaintiff's exceptions were first to the portion of the charge directing the jury to exclude noise and vibration from consideration, and second, to the like instruction as to the loss of privacy. As there was no evidence of any vibration, the first exception was too broad to raise the question in

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its application to the noise resulting from the operation of the road. (*Haggart v. Morgan*, 5 N. Y. 422; *Groat v. Gile*, 51 id. 431.)

And the question arises upon the exclusion of the subject of the loss of privacy from the consideration of the jury. It seems well established that the theory upon which an action at law may be supported by an abutting owner against the defendants is, that they are in such sense trespassers or wrongdoers as to be liable to such owners for all the injuries resulting proximately from the wrongful act of maintaining and operating their elevated road. (*Lahr v. M. E. R. Co.*, 104 N. Y. 269; *Ducker v. M. R. Co.*, 106 id. 157; *Kane v. N. Y. E. R. R. Co.*, 125 id. 164, 186.) In the latter case and in the more recent one of *American Bank Note Co. v. N. Y. E. R. R. Co. & M. Ry. Co.* (129 N. Y. 252), it was held that while such relation of trespasser continued the defendants were liable to the abutting owner for the damages occasioned to him by the noise of operating the road. This liability of the defendant is, not that for which the remedy is by action in the nature of that formerly known as trespass *quare clausum*, but rather in the nature of that known at common law, as an action on the case. (*Kernochan v. N. Y. E. R. R. Co.*, 128 N. Y. 559.) The continued invasion of the privacy of the occupant of a building very likely would have the effect to reduce the rental value of it for some purposes. The first floor of the plaintiff's building was occupied as a grocery or liquor store, and the two above were occupied by persons as places of abode. But so far as appears only two rooms are exposed or subject to the inconvenience of loss of privacy. Those rooms are on the third floor and have one window in front on Greenwich street, and two on the Franklin street side. The opportunity by means of the windows to look into the rooms, is from the station platform on both streets. The evidence on the subject was mainly given by a person who had occupied those rooms and was to the effect that the looking in the windows by the passengers and employes was very annoying; that they did it from the station platform; and that they

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interfered with the privacy of the rooms by looking in when standing on the platform, and when coming down the stairs along the building. It may be seen that this exposure of the rooms and the occupants within them to the observation of persons at all times of the day would be detrimental to them as dwelling places. While it is true that the observation taken by the patrons and employes of the defendants is not the act of the latter, the defendants have furnished the means and opportunity for those persons to invade the privacy of these rooms by looking into them through the windows, and it is by the invitation and procurement of the defendants for the purpose of the business of the road that people are at the station and on its platform. No reason appears why the defendants should not be responsible for the consequences of the loss of privacy thus occasioned so far as it depreciated the rental value of the rooms in the plaintiff's building. Those consequences detrimental to the rooms are the rational result of the maintenance of the road and the station, and are reasonably attributable to that cause.

In *Duke of Buccleuch v. Metropolitan Board of Works* (L. R. [5 Eng. & Ir. App.] 418), the plaintiff, under lease from the crown, occupied certain premises known as the Marlagn House, the garden of which extended to the Thames, where it was protected from the river by a wall through which was a door and a causeway leading to the water. The defendants, under the Thames Embankment Act, constructed a roadway in front of the premises and higher than the garden. It was there held that the loss of the use of the river frontage and the consequent *loss of privacy*, increase of dust and noise occasioned by the erection of the embankment roadway were subjects to be considered in estimating the damages to be awarded to the plaintiff.

In the present case, although the loss of privacy was properly an element for the consideration of the jury, the question arises whether the plaintiff was prejudiced by the exclusion of it from their attention. There was no evidence specifically applicable to damages resulting from loss of privacy, but the

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diminished rental upon which the plaintiff sought to recover, mainly had relation to the entire building, and was charged to have been produced by the causes which the maintenance and operation of the road furnished. This included the interference with the easements of light, air and access, as well as the consequences of noise and loss of privacy. But the latter, so far as appears, was applicable only to a couple of rooms on the third floor. It is difficult to see how the jury could, by any rule of apportionment, have determined, upon the evidence, the loss of rental for that cause, if they had been disposed to have given damages for the loss of privacy. They may, however, have given the plaintiff nominal damages for that cause, if it had not been excluded from their consideration. And as the plaintiff may have been prejudiced by the misdirection of the court, the error cannot be disregarded on review. (*Herrick v. Stover*, 5 Wendell, 580.)

These views lead to the conclusion that the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

JAMES W. CHASE, Respondent, v. SARAH C. McLEAN et al.,
Appellants.

The power of a ship's husband, as such, and in the absence of any special authority, to bind the owners of the ship by his contracts, relates only to the present or future use of the ship; it is based on present and pressing necessity.

Where, therefore, in an action against the owners of a vessel to recover an alleged loan to the ship's husband for the use of the vessel, it appeared that the loan was made when the vessel was out of commission, and that the money was borrowed and used in paying a debt contracted three years before for supplies furnished the vessel, *held*, defendants were not liable.

Also *held*, that a ship's master has no authority to borrow money at the charge of the owners to pay such an indebtedness.

McCready v. Thorn (51 N. Y. 454), distinguished.

(Argued December 11, 1891; decided January 26, 1892.)

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APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 10, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought by plaintiff, the former master of the bark "Commerce," to recover \$449.

The complaint alleged that both defendants, Sarah C. and David W. McLean, owned the ship, the defendant David being also ship's husband; that in such capacity David, with the knowledge and consent and by the authority of the defendant Sarah, contracted bills for and on account of said bark; borrowed moneys for the payment of bills, and disbursed moneys in satisfaction thereof; that on the 24th day of December, 1887, the plaintiff lent to the defendants, at their request, through said David W. McLean as agent, and ship's husband aforesaid, the sum of \$449.95, to be used and applied in paying bills and expenses of the said bark "Commerce," on condition that it should be paid in two installments, at dates specified. The answer of the defendant Sarah was a general denial. The answer of the defendant David alleged that he was both owner and ship's husband and denied that the defendant Sarah was an owner of the vessel, or of any interest therein; he admitted the receipt from the plaintiff of the sum of money alleged in the complaint, but denied that it was conditioned that it should be repaid as stated in the complaint, and alleged that it was only to be repaid in the event that there should be found such a sum due to the plaintiff after the examination of his accounts.

It appeared on the trial that the plaintiff had been the master of the bark "Commerce" from August, 1883, until December, 1887. In the latter month he collected the sum of \$800 belonging to the vessel, and exercising a captain's prerogative applied it in payment of wages then due. The defendant David, whom the evidence tended to show was the ship's husband, stated to plaintiff that he wanted some of the money to pay the ship's disbursements. The plaintiff let him have \$449,

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with the understanding that his wife, the defendant Sarah, or her father, Peter S. Parker, was to sign two notes, which he took for the loan.

The defendant David brought to plaintiff the notes bearing the indorsement "J. S. Parker," and declared that it was the signature of Peter S. Parker. The plaintiff accepted it as such. It turned out that J. S. Parker was a man without means.

This action was not brought on the notes, but against the defendants as alleged owners of the bark "Commerce," on the ground that the moneys were loaned for the use of the bark, and the notes were produced on the trial and an offer of their surrender for cancellation made. There was some controversy as to whether the loan was made as claimed by the plaintiff. The defendant, Sarah C. McLean, also denied being a part owner of the bark. These two questions of fact were submitted to the jury, the court having denied the motion to dismiss the complaint "on the stipulation that in case the jury find a verdict for the plaintiff I may reserve the case for further consideration of the law; and in case I come to the conclusion that defendant is right and plaintiff wrong upon it, then I may render judgment for the defendant, notwithstanding a verdict."

In his instruction to the jury the court directed that if they found the loan was made, and that Sarah McLean was the owner of 127-128ths of the vessel, then to render a general verdict against both defendants.

The jury having rendered a verdict in favor of the plaintiff and against both defendants, their counsel moved for judgment, notwithstanding a verdict under the stipulation.

The court in denying the motion said: "The question of law in this case is on the border line. But inasmuch as the jury has found for the plaintiff the defendant ought to bear the onus of appeal."

Other facts appear in the opinion.

Wm. H. Arnoux for appellants. Sarah McLean cannot be held liable. Even if she were the sole or part owner of the

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vessel she would not be liable. (*McCready v. Thorn*, 51 N. Y. 457; Story on Part. § 418; *Turner v. Burrows*, 8 Wend. 144; *Martin v. Farnsworth*, 49 N. Y. 555; *Rossiter v. Rossiter*, 8 Wend. 494; *Rocher v. Busher*, 1 Stark. 23; *Palmer v. Gooch*, 2 id. 386, 548; *John v. Simons*, 42 Eng. C. L. 743; *Edwards v. Hovill*, 78 id. 106; *Stearns v. Doe*, 12 Gray, 482; *Beldon v. Campbell*, 6 Exch. 886.) The judgment must be reversed for the error of law in the charge of the judge that what was done with the money was immaterial. (*Rocher v. Busher*, 1 Stark. 23; *Palmer v. Gooch*, 2 id. 386; *Stonehouse v. Gent*, L. R. [2 Q. B.] 431; *Stearn v. Doe*, 12 Gray, 482; *Webster v. Seekamp*, 4 B. & Ald. 354; *The Alexander*, 1 W. Robb. 361; *MacIntosh v. Mitcheson*, 4 Exch. 175; *Cary v. White*, 1 Bro. Par. Cas. 284; *The Sophie*, 1 W. Robb. 369; *The Ocean*, 2 id. 368; *The Helena Sophie*, 3 id. 270; *The Lula*, 10 Wall. 201; *The Grapeshot*, 9 id. 129; *The Kalorama*, 10 id. 204.) There was no evidence whatever that Sarah owned any share in the boat; so that even if David had by law the right to charge the owners, Sarah would not be liable. And it was error to submit the question of ownership to the jury, there being no conflict of evidence. (*Ward v. Bodeman*, 1 Mo. App. 272; *Macy v. Wheeler*, 30 N. Y. 231.) Admitting, for the sake of the argument, that Sarah was the owner, and that there was power in the ship's husband to borrow upon her credit for past due debts for a ship out of commission, even then plaintiff cannot recover, for there was no proof that David was ship's husband. (*Stringham v. S. N. Ins. Co.*, 4 Abb. Ct. App. Dec. 315; *McCready v. Thorn*, 51 N. Y. 454.) Defendant Sarah cannot be held as part owner, and she cannot be held under the ordinary law of agency. (*Ward v. Bodeman*, 1 Mo. App. 272; *Stedman v. Feidler*, 25 Barb. 608.) The judgment as to Sarah McLean should be reversed and the complaint dismissed as to her, with costs. All the possible evidence was given as to her liability, and it was shown that in no event can she be held liable. (*Goodale v. Lawrence*, 88 N. Y. 513.)

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Thomas J. Ritch Jr., for respondent. Fraud vitiates every contract. If, therefore, plaintiff loaned this money to and for the use of the bark's owners and on the representations of David W. McLean, and he was their agent, he has the legal right, on surrendering said obligations of indebtedness, to maintain his action directly against the principals, said owners. (3 Pet. 1, 7; 1 Phil. on Ev. 485.) This was an account stated. In proving such an account, it is not necessary to show an express examination of the respective demands or claims of the parties, or an express agreement to the final adjustment; all this may be implied from circumstances. (*Lockwood v. Thorne*, 15 N. Y. 288; 6 id. 461.) This money was obtained by one part owner of a vessel to pay for the proper expenses of said vessel and for the benefit of all the owners. One part owner of a vessel has the authority, in the absence of any known limitation to bind his co-owners for such supplies and chandlery bills as are reasonable and proper. (*McCready v. Thorne*, 51 N. Y. 451; *Provost v. Patchin*, 9 id. 240.) David W. McLean was the general agent of his co-owner, Sarah C. McLean, and had the authority to bind her in all things as he saw fit. (*McCready v. Thorne*, 51 N. Y. 451; *E. N. Y. & J. R. R. Co. v. Lightall*, 6 Robt. 407; 36 Hun, 481; 5 Abb. [N. S.] 458; *Davis v. Bemis*, 40 N. Y. 453; *Adams v. Cole*, 1 Daly, 147.) The defendant's objection to plaintiffs showing that his witness, David W. McLean, was mistaken and had made different statements on another occasion was untenable. (*Bullard v. Pearsall*, 53 N. Y. 231.) An exception to detached portions of a charge are unavailing, a charge must be considered as to its purpose and effect, and not piecemeal, but as a whole; if it conveys to the jury the correct rule of law, the judgment will not be reversed, although detached sentences may be erroneous. (*Crist v. E. R. Co.*, 58 N. Y. 638; *Caldwell v. N. J. S. Co.*, 47 id. 286; *Goll v. M. R. Co.*, 5 N. Y. Supp. 185; *Monroe v. Potter*, 22 How. Pr. 57; *Grosser v. Stellwagen*, 25 N. Y. 315; *Weil v. Reynolds*, 42 Hun, 647; *Ayrault v. P. Bank*, 47 N. Y. 570.)

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PARKER, J. The money was not borrowed for the purpose of providing a proper outfit for the vessel; to make repairs; nor to do other necessary things for an immediate voyage. She was out of commission and the plaintiff, who had been her captain for three years, had terminated that relation. It was used in paying a debt contracted about three years prior with David W. McLean's sons, for chandlery goods and ship supplies furnished to the bark "Commerce."

The question presented is whether a part owner of a vessel is legally responsible for the payment of money borrowed by a ship's husband to pay a prior indebtedness, although contracted for the benefit of the vessel? It is raised by exceptions taken to the refusal to dismiss the complaint, and to the direction of the judge to the jury, that Mrs. McLean was liable, if a part owner.

The powers of a ship's husband are determined mainly by usage and are defined in *McCready v. Thorn* (51 N. Y. 457, 458), as follows: "To provide for the complete seaworthiness of the ship; to see that she had on board all necessary and proper papers; to make contracts for freight, to collect the freight and to enter into proper charter parties; to direct the repairs, appoint the officers and mariners; to see that the vessel is furnished with provisions and stores, and generally to conduct all the affairs and arrangements for the due employment of the ship in commerce and navigation, and for all such purposes he is the agent of the owners and can bind them by his contracts." (See also 1 Bell's Comm. [5th ed.] 504; 1 Parsons on Shipping & Adm. 109; Story on Part. § 418; 1 Parsons Mar. Law, 98.)

It will be observed that these duties have reference to the future employment of the ship, and her preparation for it.

Mr. Bell, in treating of the limitations of the power of a ship's husband, says:

"(1) That, without *special powers*, he cannot borrow money *generally for the use of the ship*; though he may settle the accounts of the creditors for furnishings, or grant bills for them, which will form debts against the concern, whether he

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has funds in his hands or not, with which he might have paid them.

“(2) That, although he may, in the general case, levy the freight, which is by the bill of lading, payable on the delivery of the goods, it would seem that he will not have power to take bills for the freight and give up the possession and lien over the cargo, unless it has been so settled by charter party, or unless he has special authority to give such indulgence.

“(3) That, under general authority as ship’s husband, he has no power to insure, or to bind the owners for premiums; this requiring a special authority.

(4) That, as the power of the master to enter into contracts of affreightment is superseded in the port of the owners, so it is by the presence of the ship’s husband, to the knowledge of the contracting parties, that the ship’s husband has been appointed.” (1 Bell’s Comm. [5th ed.] 504, 505.)

The courts have modified in some respects the limitations formerly existing and necessarily correspondingly enlarged the powers of the ship’s husband.

In this state it has been held that a master has power to contract for repairs, even in a home port, if they were absolutely necessary. (*Provost v. Patchin*, 9 N. Y. 235.)

While formerly he was not permitted to borrow money, the rule was first so modified as to authorize the borrowing of money in foreign ports in case of necessity, and afterwards so as to include home ports, if the owner could not be communicated with, and the money was required immediately and for a specific purpose. (*Rocher v. Bushner*, 1 Starkie, 23; *Palmer v. Gooch*, 2 id. 377-548; *Johns v. Simons*, 42 Eng. C. L. 743; *Edwards v. Havill*, 78 id. 106; *Stearns v. Doe*, 12 Gray, 482.)

And in *McCready’s* case (*supra*), relied on by the court below in affirming the judgment, the rule was further extended, so as to permit the borrowing of money to pay for such supplies as the ship’s husband would have authority to purchase on credit. In that case the ship’s husband as such, had authority to purchase the articles, to pay for which he borrowed the necessary amount of money.

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And to the inquiry upon what principle is the one credit within, and the other without the implied authority of the agent, the learned judge responds none, except that suggested by the authorities, that the agent may dissipate and misappropriate the money. And this objection he guards against, by so qualifying the rule, laid down by the court permitting the ship's husband to borrow money, to pay for articles whenever the circumstances would permit him to purchase such articles on the credit of the owners, as to burden the lender with proving as a condition of recovery, that the money was not only borrowed for a proper purpose connected with the ship, or her navigation, but that it was actually applied to such purpose.

Our attention has not been called to any other case, which goes quite so far in support of the authority of a ship's husband to borrow money, and while we fully approve of the decision made, we do not regard it as applicable here.

The implied agency of the ship's husband, has only to do with the present, or future use of the ship. It is based on present and pressing necessity, occasioned by the dangers of navigation with a vessel out of repair, improperly rigged and inadequately provisioned.

Now this transaction, assuming as we must in view of the finding of the jury, the plaintiff's version of it, had not to do with the then necessities of the vessel, or its preparation for a voyage, for it was out of commission. If the ship's master had asserted otherwise, within the rule laid down in *McCready's* case the plaintiff would have been obliged to prove its application to such purpose. But he did not claim that it was to be so applied and in fact it was used to pay an old debt, of several years standing. For such a purpose a ship's master has no authority to borrow money at the charge of the owners.

On this appeal the respondent calls our attention to the evidence of Sarah C. McLean, which he claims conferred on David W. McLean special powers in addition to the implied authority belonging to him as ship's master.

Had the pleadings presented such an issue, the testimony to

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which he refers, considered in connection with the other evidence in the case, might have presented a question in that regard for the jury. But no such claim was made in the complaint; the cause was not tried on that theory; nor was any such question presented to the jury, or a request to that effect made.

It cannot, therefore, be made available to the plaintiff here. The judgment should be reversed.

All concur.

Judgment reversed.

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130 564

GEORGE B. MORE et al., Respondents, v. NEW YORK BOWERY
FIRE INSURANCE COMPANY, Appellant.

The mere failure of a fire insurance company to respond to an application for insurance does not raise an inference that it has accepted it and insured the risk.

To bind the company there must be actual acceptance.

Silence operates as an assent and creates an estoppel only where it has the effect to mislead.

In an action upon an alleged parol contract of insurance it appeared that S., the general agent of defendant, sent blank applications to N., with instructions that in case he secured business for defendant to fill out an application and forward to him (S.). N., on May twelfth, as a result of negotiations with plaintiffs, filled out an application and forwarded it to S. Plaintiffs were informed by N. that he could not issue a policy, and before one could be issued the application would have to be approved by some other person. S., on receiving the application, wrote to N. that the risk being special he did not wish to write it without submitting it to the company. On the same day S. wrote defendant, stating the application and the nature of the risk. Defendant, on receipt, immediately replied rejecting the application. Of this action S. neglected to notify plaintiffs or N. Plaintiffs, on May thirtieth, sent a check to N. for the premium agreed upon, which the latter received, but did not remit to S. or defendant, and it did not appear they had any knowledge of the payment. A day or two thereafter N. told plaintiffs that he had heard nothing from the company, and consequently it was all right, and they would get the policy in a day or two. The property was destroyed by fire on June sixth. *Held*, that defendant was not liable; that N. having to plaintiffs' knowledge no authority to contract, could not bind defend-

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ant by acceptance of the premium or by his conclusion drawn from its failure to report its action upon the application.

Bodine v. E. F. Ins. Co. (51 N. Y. 117); *Arff v. S. F. Ins. Co.* (125 id. 57, 64), distinguished.

More v. N. Y. B. F. Ins. Co. (55 Hun, 540), reversed.

(Argued December 21, 1891; decided January 26, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 11, 1890, which affirmed a judgment in favor of plaintiffs, entered upon the report of a referee.

This action was brought to recover upon an alleged parol contract to insure the plaintiff's creamery building in Delaware county for the term of six months from May 12 to November 12, 1887. The defendant denied the making of the contract.

It appeared that Omar V. Sage was the secretary of the Co-operative Insurance Company, a corporation engaged in the insurance business in the counties of Green, Schoharie and Delaware, and issuing policies limited in amount to \$2,500.

For the purpose of dividing risks where the value of the property on which the insurance was sought exceeded that amount he requested to be and was appointed agent for the defendant company. As such agent he had full power to fix the rate of premium, collect the same and issue policies. The Co-operative Company had numerous agents soliciting insurance in the counties named, who were informed by Sage of his appointment and the purpose of it and to whom he sent blank applications, with instructions that in case they secured business for the defendant they should fill out such applications as completely as possible and send to him at Catskill, leaving blank the place to be signed by the agent for his (Sage's) signature.

On May 12, 1887, Charles E. Nichols, one of the agents for the Co-operative Company, as a result of negotiations had with the plaintiffs, filled out one of the blank applications which had been sent to him as aforesaid, and forwarded it by mail to Sage at Catskill.

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On its receipt Sage wrote to Nichols saying that he had written to the defendant in reference to the risk, and would advise him as soon as he heard from them. That the risk was special and he did not wish to write it without first submitting it to the company.

On the same day he wrote to the defendant at New York, stating the application, and what the risk was, and the defendant immediately replied rejecting the application and declining to write the policy.

This letter from the defendant was received by Sage about May nineteenth, but he neglected to notify the plaintiffs or Nichols of the defendant's action.

The application made out by Nichols was as follows:

"New York Bowery Fire Insurance Company, of New York, in consideration of thirteen $\frac{1}{8}$ dollars, do insure G. B. More & Co. to the amount of eighteen hundred dollars on their $1\frac{1}{2}$ story frame building, shingle roofed, situated in the village of North Harpersfield, Del. Co., N. Y., on the south side of Maine street, used as a creamery for the manufacture of butter. Said eighteen hundred dollars is divided as follows: \$800 on building; \$800 on fixtures therein; \$200 on butter packages, milk cans and butter therein contained. Terms six months. Amount, \$1,800. Rate, $\frac{3}{4}$ per cent. Premium, \$13.50.

"Commences May 12, 1887. Terminates November 6, 1887.

"———, Agent."

On May thirtieth the plaintiffs sent a check for the premium agreed upon to Nichols, which he received, but never remitted to Sage or the defendant, and on June sixth the buildings were burned.

With reference to the application for the insurance the referee found that it was made after two or three conversations between Nichols and the plaintiffs, and "was written on the day of its date as the final agreement which the plaintiffs had concluded to make and as the terms had been agreed on."

"That the plaintiffs did not see the application blank."

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“That the plaintiffs understood distinctly, from their conversation with Nichols, that he could not make or issue a policy of insurance upon their property in behalf of the defendant, and that before such policy could be issued their application must receive the approval of some other person or persons.”

With reference to the payment of premium he found “that a day or two thereafter Nichols met one of the plaintiffs, who asked him if he had received the check, and said that he had received no policy, and Nichols told him that it was all right, that he had heard nothing from the company, and consequently it was all right and that he would get the policy in a day or two.”

“That plaintiffs believed that they were insured according to the terms of the writing, * * * after the assurance given them by Nichols upon the receipt of the check for the premium, that it was all right or he would have have heard from the company.” He found as a conclusion of law “that the writing of Nichols on the 12th day of May, 1887, together with the acts of the defendant and the agent Sage, and by reason of the writing not being repudiated within a reasonable time after it was submitted to the defendant, became and was a valid and subsisting contract of insurance at the time of the fire according to the terms of the writing and in the form of the standard stock policy of the state, and was as such binding on the defendant.”

Further facts are stated in the opinion.

A. H. Sawyer for appellant. On the 12th day of May, 1887, Charles E. Nichols was not, and never had been, an agent of the defendant, or authorized to solicit insurance for said company. (*DeGrove v. M. Ins. Co.*, 61 N. Y. 594; *Laws of 1886*, chap. 488; *Avery v. Ward*, 150 Mass. 160.) Had Nichols been a regularly commissioned agent of the defendant, with power to make contracts of insurance and issue policies, he could not make a parol contract of insurance, but only a parol contract to insure by the issuing and delivery of a policy of insurance in the usual form. (*Angell v. H. F. Ins.*

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Co., 59 N. Y. 173.) All the evidence in reference to the insuring of R. G. Nichols, and the taking of the application by Charles E. Nichols, was incompetent and should have been excluded under the defendant's objection. (*Wood v. P. Ins. Co.*, 32 N. Y. 623; *Adams v. G. Ins. Co.*, 70 id. 170; *Burr v. A. Ins. Co.*, 4 Hun, 275; *Bush v. W. F. Ins. Co.*, 63 N. Y. 531; *Marvin v. Wilber*, 52 id. 270; *Reynolds v. C. Ins. Co.*, 36 Mich. 131; *Fleming v. H. F. Ins. Co.*, 42 Wis. 616; *Stollenwerk v. Thatcher*, 115 Mass. 224.) Nichols had no power to make a contract of insurance, or a contract to deliver a policy of insurance which would be binding upon the defendant until accepted and ratified by it. (Story on Agency, § 133; *Chase v. H. Ins. Co.*, 22 Barb. 527, 532; *Wilson v. G. M. Ins. Co.*, 14 N. Y. 418, 421; *Marvin v. Wilbur*, 52 id. 270; *Kyte v. C. U. Ins. Co.*, 144 Mass. 43; *Harrison v. C. F. Ins. Co.*, 9 Allen, 231; *Stringham v. S. N. Ins. Co.*, 3 Keyes, 280; 4 Abb. Ct. App. Dec. 315; *Bush v. W. Ins. Co.*, 63 N. Y. 531; *Mersebau v. P. M. L. Ins. Co.*, 66 id. 274; *O'Reilly v. C. L. Ass.*, 101 id. 575; *Tale v. C. F. Ins. Co.*, 13 Gray, 79; *Lohnes v. Ins. Co.*, 121 Mass. 439; Wood on Ins. [2d ed.] 830; *Burr v. A. Ins. Co.*, 4 Hun, 275.) The burden is upon the plaintiffs to show that the alleged oral contract was within the authority of Nichols. (Wood on Ins. [2d ed.] 823, 870; May on Ins. [3d ed.] § 138; *Fleming v. H. F. Ins. Co.*, 42 Wis. 620; *Mersebau v. P. M. L. Ins. Co.*, 66 N. Y. 274, 279; *Harrison v. C. F. Ins. Co.*, 9 Allen, 233; *Lobdell v. Baker*, 1 Metc. 201; *Adriance v. Roome*, 52 Barb. 399, 411.) The findings of law, by the referee are wholly unwarranted. (*Huskin v. A. Ins. Co.*, 78 Va. 700; *Misselhorn v. M. R. F. L. Assn.*, 30 Fed. Rep. 545; *R. Ins. Co. v. Beatty*, 119 Penn. St. 6; *Sargent v. N. F. Ins. Co.*, 86 N. Y. 626.)

John P. Grant for respondents. The powers of an insurance agent are *prima facie* co-extensive with the business entrusted to his care, and will not be narrowed or limited by limitations not communicated to the person with whom he deals. (*Ins. Co. v. Wilkinson*, 13 Wall. 222.) Sage had power

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and authority to transact the business of the defendant through clerks, assistants or sub-agents, and their acts were his acts if within the scope of his authority, and would bind the company. (May on Fire Ins. 159; *Bodine v. E. F. Ins. Co.*, 51 N. Y. 117; *E. F. Ins. Co. v. R. Ins. Co.*, 55 id. 343; *Arff v. S. F. Ins. Co.*, 125 id. 57; *Davis v. I. Ins. Co.*, 18 Hun, 230.) The defendant ratified the relation of the agent or solicitor, Nichols, with Sage in making the contract for insurance on R. G. Nichols' store and contents, by accepting the risk, receiving the premium and issuing the policy, thereby approving of Nichols' employment as solicitor. (*Plumb v. C. Ins. Co.*, 18 N. Y. 392; *Newman v. S. Ins. Co.*, 17 Minn. 123; *Goodson v. Brook*, 4 Camp. 163; *Rowley v. E. Ins. Co.*, 36 N. Y. 550.) The acts of the agent, Sage, were within the scope of his authority in making the contract in question, and bind the company. (*Kuney v. A. Ins. Co.*, 36 Hun, 68; *N. A. Ins. Co. v. Thorpe*, 7 Am. Rep. 138; *Ins. Co. v. Wilkinson*, 13 Wall. 322; *Peckham v. P. Ins. Co.*, 65 N. Y. 195; *Bodine v. E. F. Ins. Co.*, 51 id. 117; *Armour v. M. C. R. R. Co.*, 65 id. 122.) The parties could make a valid parol contract to insure, and the contract can be enforced. (*Trustees, etc., v. B. F. Ins. Co.*, 19 N. Y. 305; *S. F. Ins. Co. v. K. M. & F. Ins. Co.*, 7 Bush. 81; *Sherman v. N. F. Ins. Co.*, 46 N. Y. 500; *Angel v. H. F. Ins. Co.*, 59 id. 171; *Ellis v. A. C. F. Ins. Co.*, 50 id. 492.) The contract in question lacks none of the necessary elements to make it complete. (May on Fire Ins. §§ 41, 42, 44; Wood on Fire Ins. 23.) The payment of the premium was the performance of the contract on the part of the plaintiffs, and binds the company. (*Perkins v. W. Ins. Co.*, 4 Conn. 625.) The agent, Nichols, accepted plaintiffs' check in full payment of the premium. (May on Fire Ins. 136; Wood on Ins. 74.) The agent, Nichols, having authority to collect the premium, his neglect to account to the company cannot be charged to the plaintiffs. (May on Fire Ins. 137.) The knowledge of the agent, Sage, is the knowledge of the company. (*Peckner v. P. Ins. Co.*, 65 N. Y. 208.) The

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company should be held responsible for the neglect of its agent. (*Fisher v. Cottennett*, 44 N. Y. 538.) The defendant waived proof of loss and cannot avoid liability upon the ground of failure of notice of loss, or any informality in the notice. The refusal to pay the loss by the company upon the ground that there never was any contract to insure, is a waiver of notice. (*Audubon v. E. Ins. Co.*, 27 N. Y. 234; *O'Neill v. B. F. Ins. Co.*, 3 id. 122; *McMaster v. W. C. M. Ins. Co.*, 25 Wend. 379; *Penley v. B. Ins. Co.*, 7 Grant, 130.) A failure on the part of the insurer to notify the assured of the rejection of his application can be construed as an acceptance thereof, the insurer promising to notify the assured if the application was rejected. (*Ins. Co. v. Johnston*, 23 Penn. St. 72.) The point made by the defendant that under chapter 488, Laws of 1886, that "in any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of the company," and, therefore, no agency was established by the proof in this case, is not well taken. (*Arff v. S. Ins. Co.*, 125 N. Y. 57.) The acts of the agent Nichols in connection with the acts of the agent Sage, in reference to the contract and its acceptance, are binding upon the defendant. (*Arff v. S. F. Ins. Co.*, 125 N. Y. 57.)

BROWN, J. The question presented in this case is whether there was a contract for insurance between the parties and it may be said that if such a contract existed at any time subsequent to May twelfth it had not been rescinded or annulled at the time of the fire.

If there was a contract it grows out of the acts of the agent Sage and his subordinate Nichols, which are binding upon the defendant notwithstanding the fact that it promptly refused to accept the risk or issue a policy when the application was presented to it.

An agent of a fire insurance company having unrestricted authority to accept risks, fix premiums and make and issue policies has power to bind his principal by a preliminary parol contract to issue a policy. (*Ellis v. Albany City Fire Ins.*

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Co., 50 N. Y. 402; *Angell v. Hartford Fire Ins. Co.*, 59 id. 171.)

Such was the power possessed by Sage as agent of the defendant and had he agreed to issue a policy to the plaintiffs the judgment could be sustained.

The General Term based its decision upon the application of the principle of the cases cited to the facts which that court assumed to exist that Sage knew on May sixteenth that the insurance according to the agreement between Nichols and the plaintiffs was to take effect from May twelfth and that the plaintiffs relied upon the defendant as an insurer of their property, and that Sage's silence under these circumstances was in legal effect an approval of the application and a consent on the part of the defendants to enter into the contract contemplated by the plaintiffs. That Sage had the power and authority to make just such a contract as plaintiffs claim was made may be conceded, but the facts assumed by the General Term were not found by the referee.

He refused to find that Nichols agreed that in case the property was burned after May twelfth plaintiffs would get their insurance or that the agreement was to commence on that date. The finding that he did make was that the evidence tended to the belief that it was to be considered as commencing on that day.

But this was qualified by another finding that plaintiffs understood from Nichols that he could not issue a policy, and that before that was done their application must receive the approval of some other person. In effect this was a finding that there was not to be a contract until the application was approved elsewhere.

The evidence does not disclose that Sage had any knowledge concerning the negotiations between plaintiffs and Nichols except such as he derived from the application and in view of the findings of the referee that I have quoted it cannot be said that on May sixteenth he knew or had any reason to suppose that the plaintiffs relied upon the defendant as an insurer of their property. On the contrary the finding of the referee in

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reference to the plaintiffs' belief on that subject is that they "believed that they were insured after being informed by Nichols that he had received the premium and that it was all right or he would have heard from the company."

But this was on June first, and on May eighteenth Sage had informed Nichols by letter that he could not approve the application — that the risk was a special one and could not be accepted without the defendant's consent. It appears, therefore, that the referee has not found that plaintiffs relied upon the defendant as insurer of their property, until about June first, six days before the fire, and that this resulted not from Sage's neglect to inform them that the application was refused, but from what Nichols told them on that date.

It is contended, however, that a contract can be inferred from Sage's silence and failure to notify the plaintiffs that the application was rejected. This, I think, would be a novel doctrine to introduce into the law of contracts. In discussing it I assume Sage's powers to have been those of a general agent and co-extensive with that of the defendant.

The courts have applied the principles of waiver and equitable estoppel in a most liberal manner to insurance contracts, but always to enforce good faith and to prevent injustice and fraud where the insured has been misled by the acts of the company or its agents. But no case has yet decided that the mere failure to respond to an application raised an inference that the company accepted and insured the risk.

A party cannot be held to contract where there is no assent.

Silence operates as an assent and creates an estoppel only when it has the effect to mislead.

There must be such conduct on the part of the insurer as would, if it were not estopped, operate as a fraud on the party who has taken or neglected to take some action to his own prejudice in reliance upon it. (2 May on Ins. § 508.)

When a party is under a duty to speak, or when his failure to speak is inconsistent with honest dealings and misleads another, then his silence may be deemed to be acquiescence.

If the company knew a person was acting as its agent with-

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out or in excess of authority and did not disclaim his acts, it might be held liable, as in such a case there is a duty to speak.

But this case presents no element of that character.

The plaintiffs knew that Nichols had no authority to contract with them on behalf of the defendant. Their application was promptly rejected by the defendant when it reached it.

They were not misled by the neglect of Sage to notify them of that fact. They knew they had no contract until the application was approved and they could at any time have withdrawn their application and secured other insurance. If they had done so and the defendant had issued a policy, it could not be claimed that they were liable for the premium. It is very plain that they relied upon Nichols and his statement that "it would be all right," but as they knew he had no power to speak for the company their trust was in him alone and they had at no time any legal claim upon the defendant.

While I do not find that this question has been presented before in the courts of this state, it has been raised in other jurisdictions and decided adversely to the plaintiffs' claim.

In *Insurance Co. v. Johnson* (23 Penn. St. 72), a fire occurred six months after the application was made, during which time the company had neglected to notify the plaintiffs that their application was rejected, and that delay was claimed to justify the inference of a contract. It was held that a proposal could not become a contract from delay in rejecting or answering it.

In *Royal Ins. Co. v. Beatty* (119 Penn. St. 6), the validity of a policy by renewal was involved, and it was decided that when, in an action upon a contract, plaintiff's case consists of proof of a proposal with the presumption of assent thereto arising from silence of the defendant, no legal inference of a contract can arise out of such silence without evidence of a duty to speak on the part of the defendant, which was neglected to the plaintiff's harm.

To the same effect are *Haskin v. Agricultural Fire Ins. Co.* (78 Va. 700); *Misselhorn v. Mut. R. F. Life Assn.* (30 Fed. Rep. 545); *Winnesheik Ins. Co. v. Holzgrafe* (53 Ill. 516).

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And it was said in *Titus v. Glens Falls Ins. Co.* (81 N. Y. 410), in reference to a waiver by an insurance company of a breach of a condition which forfeited the policy, that "A waiver cannot be inferred from mere silence. It (the company) is not obliged to do or say anything to make a forfeiture effectual."

And it may be added that a person is under no obligation to do or say anything concerning a proposition which he does not choose to accept.

Our opinion is that when an application for insurance is made, and its rejection is not signified, no presumption of its acceptance can be indulged in.

There must be actual acceptance, or there is no contract.

The respondent contends further that the company was bound from the time of the payment of the premium to Nichols. This payment was never remitted to Sage or to the company, and it is not found that they had any knowledge of it. Its effect, therefore, depends on the relation which Nichols bore to the defendant, and the knowledge which plaintiff had of his powers.

There is no finding in the case that Nichols was the defendant's agent. The referee refused to find either that he was or was not defendant's agent. He found that Sage had authority to appoint sub-agents, and that the acts done by Nichols in connection with the risk in question were within the scope of Sage's authority. But this does not aid the plaintiffs in view of the express finding that plaintiffs knew that the application had to be submitted to some other person or persons, and approved by them before a policy could be issued.

The negotiations with Nichols did not reach the point where a contract was made. Nichols did not assume to have power to contract. The plaintiffs understood that perfectly. There was an application to defendant through Nichols. He was the solicitor merely. His apparent power to represent the defendant did not go beyond that. The application was to be approved by, and the contract to come from, some person other than him.

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That person was either Sage or the company. The application reached and passed Sage without approval, and of this fact Nichols was informed, and he then knew that the contract, if made, must come from the company. About June first, the plaintiff learned from Nichols that he had received no word from the company that the application had been approved or the risk accepted. In substance, Nichols informed them that approval must come from the company, and yet he told them, because it had not come, it was all right, and they would get the policy in a day or two.

Now, it is very plain that Nichols had no authority to make that statement. Had plaintiffs any right to rely upon it?

Did the acceptance of the premium by Nichols, coupled with the statement that it was all right and the policy would come in a day or two, bind the defendant? Obviously not, under the finding that plaintiffs had been informed that he had no power to make or issue a policy, and that before their application could grow into a contract, it must be approved elsewhere. This fact, of which plaintiffs were informed at the beginning of their negotiations, limited and qualified all their subsequent dealings with Nichols. The payment of the premium could not, therefore, bind the defendant, as Nichols had no authority to contract on its behalf, and for the same reason his statement that "it was all right and they would get the policy in a day or two," was the expression of an opinion merely. Having no power to contract, he could not bind the defendant by a representation as to the effect of its failure to report its action upon the application. A different question would have been presented had the plaintiffs dealt with Nichols as the agent of the defendant, with no knowledge as to any limitations upon his power. (*Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; *Arff v. S. F. Ins. Co.*, 125 id. 57-64.) But such a case is not presented on the facts as found by the referee.

The judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

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MARGARET DEXTER, Respondent, v. RANDOLPH BEARD,
Appellant.

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One C. being the owner of certain premises upon which was a lane or drive-way sixteen feet in width, running east from a street, upon the south side of which lane was a store with a hatchway, giving access to the cellar which projected into the lane about five feet, sold and conveyed by full covenant deed to B., "his heirs and assigns," that portion of the premises north of the lane, "also a right of way the whole length of the south line" of the premises conveyed, "between said south line and a line drawn parallel with the north side of the store * * * to be used by the grantee in common with the grantor, said lane not to be encumbered or built upon by either party." C. subsequently sold and conveyed the remaining portion of said premises, reserving the right of way between the store and B's south line, to be used mutually by the grantee and B., "their heirs or assigns respectively." Defendant having acquired title to the south portion, erected a building thereon which occupied over four feet of the lane. In an action brought by plaintiff, who had acquired title to the north portion, to compel the removal of that part of the building which encroached upon the way, evidence was introduced which, considered with the deed, authorized the finding, and the court found it was the intent of the parties to the deed first mentioned that the right of way should embrace the whole sixteen feet. *Held*, that the covenant that the lane "was not to be encumbered or built upon by either party," was one running with the land; that the words "either party" were not used in a restrictive sense, but as including all persons whom the party undertook to represent and bind with himself, that is "his heirs, executors, administrators and assigns;" and that, therefore, plaintiff was entitled to the relief sought.

Harsha v. Reid (45 N. Y. 415); *Clark v. Devos* (124 id. 120), distinguished.

(Argued December 23, 1891; decided January 26, 1892.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made July 20, 1889, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action is in equity to compel the defendant to remove a portion of a brick store erected upon his land in the village of Cortland, which plaintiff claims encroaches upon a right of way which she uses jointly with the defendant.

The facts, so far as material, are stated in the opinion.

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A. P. Smith for appellant. The south line of the right of way being uncertain as to location, making the right of way granted indefinite as to width, it is a well-settled principle that the grantee and those claiming under him, are limited in the extent and scope of their right by the necessity which gave rise to the grant. (*Nichols v. Luce*, 24 Pick. 102; *York v. Briggs*, 7 N. Y. S. R. 124; *Rexford v. Marquis*, 7 Lans. 249; *Huson v. Young*, 4 id. 63; *Bakeman v. Talbot*, 31 N. Y. 366; *Goddard on Ease*. 333; *Atkins v. Bordman*, 20 Pick. 291; 2 Metc. 457; *Mathews v. D. & H. C. Co.*, 20 Hun, 427; *Farrington v. Burdy*, 5 id. 617; *Tyler v. Cooper*, 47 id. 97; Code Civ. Pro. §§ 992, 993; *Clark v. Devoe*, 124 N. Y. 120.) This action could not have been sustained, if the plaintiff had sufficient left north of defendant's building for any useful and proper purpose had in view at the time of the grant. (*Johnson v. Kinnicut*, 2 Cush. 153; *Washb. on Ease*. [4th ed.] 287; *Spencer v. Weaver*, 20 Hun, 450; *Harding v. Wilson*, 2 Ban. & C. 96; *Rexford v. Marquis*, 7 Lans. 250; *Shaver v. Cohn*, 40 How. Pr. 129; *Jackson v. Allen*, 3 Cow. 220; *T. I. Co. v. Cunningham*, 8 Allen, 139.) It was error for the court to refuse to find that under the undisputed evidence, and under the deeds plaintiff and her grantors were entitled to only so much of the lane as was necessary for the reasonable use of the same as a passage-way. (*Kennedy v. Porter*, 109 N. Y. 526; *Griffiths v. Morrison*, 106 id. 165; *Odgen v. Jennings*, 62 id. 526; *Grafton v. Moir*, 30 N. Y. S. R. 314.) The clause in the deed from Crosby to Barnard, granting a right of way, should be construed in the light of the circumstances existing when the contract was entered into, the situation of the parties to the deed and the consideration therefor. (*French v. Carhart*, 1 N. Y. 96-102; *Bridger v. Pierson*, 45 id. 601, 604; *Winchester v. Osborne*, 61 id. 561; *Hall v. W. Co.*, 103 id. 129, 136; *Coleman v. Beach*, 97 id. 553; *Manners v. Johnston*, L. R. [1 Ch. Div.] 673, 678; *Bagnall v. Davies*, 140 Mass. 76; *Sanburn v. Price*, 129 id. 387.) Assuming that the width of the right of way was indefinite by the grant, and the parties selected the place where they would exercise the

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easement thus granted, what was before indefinite became fixed and certain and the easement could not be exercised in any other place. In such case where there has been a practical location of the way granted the grantee cannot afterwards change it. (*Onthank v. L. S. & M. S. R. R. Co.*, 71 N. Y. 194-197; Washb. on Ease. 225-240; *Wynkoop v. Burger*, 12 Johns. 222; *Bannon v. Angier*, 2 Allen, 128; *Jennison v. Walker*, 11 Gray, 423.) The express covenant in the deed from Crosby to Barnard, "said lane not to be encumbered or built upon by either party," was a personal covenant, not running with the land. (*Clark v. Devoe*, 124 N. Y. 120; *Harsha v. Reid*, 45 id. 415.) In this class of cases time is not a necessary element, as the owner of the easement is held to be estopped. (Washb. on Ease. [3d ed.] 661; *Snell v. Levitt*, 110 N. Y. 595, 602, 603; *Welsh v. Taylor*, 27 N. Y. S. R. 301; *Latimer v. Livermore*, 72 N. Y. 174; *Corning v. Gould*, 16 Wend. 532; 3 Kent's Comm. 448; *Cartright v. Maplesden*, 53 N. Y. 622; *Dillman v. Hoffman*, 38 Wis. 559; *Crane v. Fox*, 16 Barb. 184; *Pope v. O'Hara*, 48 N. Y. 446.) If, under a strict construction of the grant from Crosby to Barnard, the court should decide that the right of way there given was intended to and did embrace the hatchway, or if the court should hold that the express covenant contained in the deed, "said lane not to be encumbered or built upon by either party," was not personal, but a charge running with the land, even then, under the circumstances shown in this case, a court of equity should not grant the harsh relief demanded; and this judgment should be reversed. (*Trustees, etc., v. Thatcher*, 87 N. Y. 317; *Clark Case*, 18 Barb. 350; *Welch v. Taylor*, 50 Hun, 146; *Conger v. Hedges*, 45 id. 296; *City of London v. Nash*, 1 Ves., Sr., 12; *Willard v. Taylor*, 8 Wall. 557; *Peters v. Delaplain*, 49 N. Y. 362; *Bruce v. Tillson*, 25 id. 202; *McWilliams v. Long*, 32 Barb. 194; *Margraf v. Muir*, 57 N. Y. 155; *Mathews v. Terwilliger*, 3 Barb. 51; *Delevan v. Duncan*, 49 N. Y. 485; *Taylor v. Longworth*, 14 Pet. 172; *Page v. McDonnell*, 55 N. Y. 299.) It was error to find that the plaintiff was entitled to an injunction. (*Calhoun*

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v. *Millard*, 121 N. Y. 69; *Young v. Campbell*, 75 id. 525; *Town of Venice v. Woodruff*, 62 id. 462; *McMurray v. Noyes*, 72 id. 523.) The court erred in allowing the plaintiff to testify to a conversation she heard between Daniel Bradford and her grantor, William O. Barnard. (Code Civ. Pro. § 829; *Holcomb v. Holcomb*, 95 N. Y. 316; *In re Dunham*, 121 id. 575; *In re Eysaman*, 113 id. 62.)

J. E. Eggleston for respondent. The expression in the deed "said lane not to be encumbered or built upon by either party," is a covenant by both parties to the deed. (1 Add. on Cont. § 227; 2 Wait on Act. & Def. 366; *Bull v. Follett*, 5 Cow. 170; *Lovering v. Lovering*, 13 N. H. 513; *Booth v. C. N. Co.*, 74 N. Y. 21; *Watertown v. Cowen*, 4 Paige, 510; *P. Ins. Co. v. C. Ins. Co.*, 87 N. Y. 400; *Story v. N. Y. E. R. Co.*, 90 id. 122; *Hart v. Lyon*, Id. 663; *Avery v. N. Y. C. R. R. Co.*, 106 id. 142.) The defendant, when he took his title, had notice of this covenant, and took his deed subject to it. The right to the uninterrupted user of the whole of the land, as it was in 1846, was granted by the terms of the deed. (*Huttemeir v. Albro*, 18 N. Y. 48; *Doyle v. Lord*, 64 id. 432.) Twenty years' uninterrupted and unqualified enjoyment and user of such a right as plaintiff claims is decisive evidence of such a grant. (*Lansing v. Wisewell*, 5 Den. 213; *Hammond v. Zehner*, 21 N. Y. 118; *Ward v. Warren*, 82 id. 265; *Nichols v. Wentworth*, 100 id. 455; *Taylor v. Hopper*, 2 Hun, 651; 62 N. Y. 649; *Child v. Chappell*, 9 id. 241.) The claim made by defendant that the covenant in the deed not to build was broken before the title came to defendant or to plaintiff, and that, therefore, this plaintiff had no remedy on the covenant, is not well taken. (*Maynard v. Mayor, etc.*, 11 Paige, 428; *Beach v. Crain*, 2 N. Y. 86; *A. D. Co. v. Leavett*, 54 id. 35; *Trustees, etc., v. Lynch*, 70 id. 440.) When defendant built upon the lane, he broke the covenant in the deed, and this action lies on account of that breach, to compel the removal. (*Trustees, etc., v. Cowen*, 4 Paige, 510; *DuBois v. Darling*, 12 J. & S. 436; *Taylor v. Hopper*, 62 N. Y.

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649; *P. Ins. Co. v. C. Ins. Co.*, 37 id. 400; *Wheelock v. Noonan*, 108 id. 179.) The point made by the counsel for appellant at General Term that the covenant not to build upon the lane should not be enforced in equity, when the plaintiff can have full indemnity in damages in an action at law, is not tenable. (*Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98.)

PARKER, J. By the judgment in this suit it was decreed that the defendant remove so much of a building erected by him, as stands upon a strip of land of the width of four and four-tenths feet, and in length ninety feet, on the ground that it is an obstruction to a right of way granted to the plaintiff, and her predecessors in title, by one Parker Crosby, who was the common source of title of both plaintiff and defendant.

Prior to May 5, 1846, Parker Crosby was the owner not only of the space between certain buildings, a portion of which is in controversy here, and which the plaintiff claims to be entitled to use in common with the defendant as a right of way, but also of the lands and buildings on either side of it.

At that time the condition of the premises was as follows: A lane or driveway sixteen feet in width extended east and west from Main street. On the north side of the lane was a fence, extending from the street back about one hundred and fifty feet, while on the south was a store, occupied by one Van Valen, which ran from the street back about forty feet, in the rear of which was an open space, where teams were accustomed to be driven for the purpose of loading and unloading butter and other produce, temporarily stored in the back portion of the store. On the north side of the Van Valen store, and about twenty feet from the street, there was a hatchway extending out into the lane, from the building about five feet, and of the width of four and one-half feet. It was walled up on three sides, and was used for the purpose of lowering heavy packages into the cellar. On the outer or northerly side the wall was built up to about the level of the ground, while the side walls slanted from such height to the top of the cellar

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wall, which was about twenty inches above the ground. A framework was placed on the top of the three sides, and on this were doors opening each way. From this hatchway, and projecting about two feet from the upper story of the store, there was a beam covered with a hood, to which a pulley and rope could be attached, and worked in lowering or raising heavy packages in the hatchway. On the last-mentioned date, Parker Crosby granted and conveyed to Wm. O. Barnard, his heirs and assigns, the premises next adjoining the north side of the lane. The deed, immediately after the description of the premises, contained the following: "Also a right of way, the whole length of the south line of the above-described lot, between the said south line and a line drawn parallel with the north side of the store, now occupied by the said James Van Valen, or the grantor's village lot this day mortgaged to said grantee, to be used by the grantee in common with the grantor; said lane not to be encumbered or built upon by either party." * * * Through several mesne conveyances, that portion of the land which next adjoins the lane, on the north of the right of way granted by said deed, passed to the plaintiff, who obtained title February 1, 1882. About three months after the conveyance to Barnard, and on August 12, 1846, Crosby conveyed to Van Valen the premises south of the north line of the lane, which included the store on the south side thereof, the deed containing the following reservation: "Except the right of way between the store and Barnard's south line, to be used mutually by Barnard and Van Valen, or their heirs or assigns respectively." By subsequent conveyance the title to the premises thus granted became vested in the defendant January 23, 1882. Each of the intermediate deeds, as well as the one to the plaintiff, contained an exception in substantially the same language as in the one from Crosby to Van Valen. The deed to the defendant, in addition, contained the following: "The right of way hereinbefore excepted is the same right of way described in the deed from Parker Crosby and wife to William O. Barnard, recorded in Cortland county clerk's office May 14, 1846."

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It does not appear that by any act of the plaintiff, or her predecessors in title, the easement granted to Barnard had been acquired by the defendant, or his grantors; therefore, the plaintiff had at the commencement of this suit all of the rights which were granted in the deed from Crosby to Barnard.

The first question presented to the trial court for determination was, whether the right to use the whole of the space between the Van Valen store and the north side of the lane was granted, or so much thereof as was necessary for the use which gave rise to the grant?

Inasmuch as the south line was declared to be "a line drawn parallel with the north side of the store now occupied by James Van Valen," the defendant contended that a line equi-distant from the north side of the store at all points was only provided for, and, therefore, the description is as well satisfied by a line five or ten feet from the north side of the store, as one next along it. That the line created was adjustable and uncertain as to location. It was further contended on the part of the defendant that the existence of the covered hatchway in the lane at the time of the conveyance in 1846, tended to show that the intention of the parties were that only so much of the land as should be required for the purpose of passage of teams should be granted, for they could hardly have intended that the hatchway should be closed up and the store deprived of the benefit of it, while there remained eleven and six-tenths feet between the north side of it and Barnard's line for a driveway. On the other hand it was insisted that the line referred to was one along the north side of the store; that the use of the word "parallel" was not intended to make the line indefinite and uncertain as to location, but was made necessary because of the fact that the store only extended back forty feet from the street, and as plaintiff was granted a right of way ninety feet deep, the limits of the right of way were thus accurately described for a distance of fifty feet in the rear of the store as well as along it. A part of the sentence describing the right of way declares "said lane not to be encumbered or built upon by either party," and this, it was insisted by the plaintiff,

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was a strong indication of the intention of the parties to include the entire sixteen feet in the right of way, for the word "lane" did not suggest any limitation certainly upon the width to be used and not to be built upon, but was so comprehensive as to necessarily embrace the entire width of sixteen feet. Evidence was also offered tending to show that this lane was largely used by teamsters, and that while the main travel was north of the hatchway, that to some extent wagons actually passed over it. In view of the fact that the phraseology employed in describing the right of way was susceptible of more than one interpretation, thus presenting a question as to what was intended by the parties to the instrument; whether they sought to preserve for all time a right of way of the full width of sixteen feet or merely a passageway of sufficient width to meet the necessities of the parties, became a question for the court to determine. In the absence of language clearly expressing the object which the parties intended to accomplish, the court was permitted, and it was its duty, to look at the surrounding circumstances existing when the contract was entered into, the situation of the parties and the subject-matter of the instrument. (*Heath v. Hewitt*, 127 N. Y. 166.)

In conformity with this rule evidence was introduced which, considered with the deed, permitted the court to find as a fact whether the parties intended that the description should embrace the entire space or only so much of it as should be necessary for the use of the parties for a single driveway. (*Simmons v. Cloonan*, 81 N. Y. 557-562.) The intent being found, its employment as an aid in the construction of the doubtful clause necessarily followed. Now, the trial court found that from the 12th of August, 1846, to the present, the plaintiff and her grantors were the owners of the right of way mentioned in the complaint, and "that said right of way is of the width of sixteen feet and extends in length from Main street or easterly to a distance of more than ninety feet. The same being defined in the deeds." This finding was required, we think, if the surrounding circumstances considered in connection with the writing, induced, as it apparently did, the con-

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clusion that the parties so intended. Therefore, in such further consideration as may be given, we shall deem it established that the grant described in the deed was of a right of way sixteen feet in width and about ninety feet deep.

The appellant contends that if so, it is merely a description of the land in, through and over which the grantee was entitled to a right of way, and would not necessarily describe the limits of the way granted; therefore, this action cannot be maintained if the plaintiff has a sufficient right of way north of defendant's building for the purposes had in view at the time of the grant. His position in that respect requires consideration, unless the plaintiff can take advantage of the covenant providing "said lane not to be encumbered or built upon by either party." This the appellant insists she cannot do, because the covenant is one not running with the land, but a mere personal covenant between the original grantor and grantee. In support of such contention is cited *Harsha v. Reid* (45 N. Y. 415), and *Clark v. Devoe* (124 id. 120). In *Harsha's* case the covenantees did not derive their title from the covenantor, for the covenant was an independent personal contract in no way connected with the title. The defendant in that case made a contract with a third party that no one should be allowed to erect a grist-mill on a water privilege which was included in a subsequent sale to the plaintiff. By it was granted no interest in the premises to the covenantees, and it was, therefore, a purely personal contract, which could in no way burden the estate which came to the subsequent grantees. It has, therefore, no bearing upon the question here presented. In *Clark's* case the owner of two adjoining lots in the deed, conveying one of them, covenanted for himself, his heirs, executors, administrators and assigns, that he would not erect on the lot remaining unsold any building which should be regarded as a nuisance.

It will be observed that the covenant had no relation to the land conveyed, but referred wholly to premises with reference to which neither party parted with, or received any title or interest at the time with or as a part of making the covenant.

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It was then a mere personal covenant, not binding on a subsequent grantee of such premises. The question presented, therefore, was whether this personal covenant rendered the covenantor liable to respond for the acts of subsequent grantees as well as his own, or only for his own. And the court held that the grantor only intended to contract against his own acts, and the covenant should not be read distributively as if the grantor had covenanted that he would not erect a structure which should be regarded as a nuisance, nor would his executors, administrators or assigns.

Here the question presented is quite different. The grantor in the deed conveying the fee of certain lands, also granted an easement in a strip of land adjoining, which was described. While the fee still remained in the grantor, the easement of a right of way became annexed to the lands conveyed. And to more securely effectuate the intention of the parties that the right of way should not be interfered with, it was further agreed that the lane should not be encumbered or built upon by either party.

Notwithstanding the manifest intention of the parties and the fact that the clause covenanting against encumbrances on the right of way, formed a part of the sentence describing the limits of the easement, the appellant contends that the easement was not intended to bind other than the immediate parties to the instrument, because in that phrase the words "either party" were used instead of "either party, their heirs, executors, administrators or assigns."

The construction thus contended for would, we think, not only do violence to the intention of the parties, but would be too narrow, in the light of the phraseology elsewhere employed in the deed. It recites that the parties of the first part, "doth grant, bargain, sell, alien, remise, release and convey unto the party of the second part, and to his heirs and assigns forever," the premises described, and also the right of way, which concludes with the phrase "said lane not to be encumbered or built upon by either party." And further declares that the party of the first part, for themselves, their heirs, executors, administrators

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and assigns, do covenant and agree to and with the party of the second part, his heirs and assigns, that they are seized of the estate, have a good right to convey, that the estate is free from encumbrances, and that the grantee shall have quiet enjoyment of every part, without molestation by the parties of the first part, their heirs or assigns.

Had the words "either party" been omitted, it would not have been contended but that the covenant bound all subsequent grantees. And their use cannot be held to have been intended to limit the duration of the covenant to such a period as the grantor and grantee should severally remain the owners of the dominant and servient estates, for they were undoubtedly employed, not in a restrictive sense, but broadly, so as to include by the word "party" all persons whom the party undertook to represent and bind with himself, viz., the party of the first (or second) part, his heirs, executors, administrators or assigns.

It follows that so much of defendant's building as encroached upon the lane, was in violation of the rights of the plaintiff, and she thereby became entitled to have the wrong righted. The court, in the exercise of a discretion, guided by established equitable principles, reached a conclusion that the injunction prayed for in the complaint afforded the only adequate remedy, and no sufficient reason has been pointed out to support a reversal of such determination by this court. We have examined the exceptions to which our attention has been directed, but they do not call for a reversal of the judgment, and need not be discussed.

The judgment should be affirmed.

All concur, except VANN, J., not voting.

Judgment affirmed.

Statement of case.

ALEXANDER ARMSTRONG, Respondent, v. AGRICULTURAL INSURANCE COMPANY of Watertown, N. Y., Appellant.

While a waiver of a condition of forfeiture contained in a policy of insurance need not be based upon a technical estoppel, in the absence of an express waiver, some of the elements of an estoppel must exist; the insured must have been misled by some action of the company, which caused the omission, to comply with the condition, or it must have done something, after knowledge of a breach of the condition, which could only be done by virtue of the policy, or required something from the assured which he was bound to do only at the request of the company under a valid policy, or exercised a right which it had only by virtue of such policy.

Defendant issued a policy of fire insurance to one B., payable to plaintiff as mortgagee "within sixty days after due notice and proof of the same made by the assured." The policy contained a provision to the effect that it should become void upon the commencement of proceedings to foreclose a mortgage upon the insured property, unless the written consent of the company was obtained. Plaintiff commenced an action to foreclose his mortgage without having obtained such consent; subsequently he wrote to defendant that he had commenced such an action without discovering the clause requiring a consent, and asked for consent to continue the action. The letter was received by defendant, but no reply was made to it. A judgment of foreclosure and sale was entered, and thereafter the buildings insured were burned. B. having refused to make proofs of loss, they were made by plaintiff. Defendant on receipt declined to accept them upon the ground that they were not made by the assured as required by the policy. Plaintiff thereupon again solicited B to make the proofs, but he refused. Plaintiff then sent an affidavit of B.'s refusal. Defendant replied that this did not obviate the objection. In an action upon the policy, the court held that defendant had waived the forfeiture caused by the foreclosure by its failure to reply to plaintiff's letter notifying it thereof and asking consent; also by its demand for proofs of loss made by the owner of the property. *Held*, error; that defendant was under no obligation to reply to said letter, and its failure to reply did not authorize an inference of an intent to waive the condition, nor was it waived by the omission of the company to assert the forfeiture in connection with its objection to the proofs of loss.

Titus v. Glens Falls Ins. Co. (80 N. Y. 410); *Roby v. Am. Cent. Ins. Co.* (120 id. 510), distinguished.

Armstrong v. A. Ins. Co. (56 Hun, 399), reversed.

(Argued December 23, 1891; decided January 26, 1892.)

130	560
140	28
130	500
141	224
180	560
150	194
130	560
156	87
156	682
180	560
159	424

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 15, 1890, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

A. H. Sawyer for appellant. No proof of loss, as required by the terms and conditions of the policy, was ever made or furnished to the company. (*Grosvenor v. A. Ins. Co.*, 17 N. Y. 391; *Cornell v. Le Roy*, 9 Wend. 163; *Barnes v. U. Ins. Co.*, 45 N. H. 21; *W. F. Ins. Co. v. G. & B. S. M. Co.*, 45 Mich. 131; *Graham v. P. Ins. Co.*, 77 N. Y. 177; *Heilman v. W. Ins. Co.*, 75 id. 12; *Perry v. L. Ins. Co.*, 61 id. 214; *Hine v. Woolworth*, 93 id. 75; *Merwin v. S. Ins. Co.*, 7 Hun, 659; 72 N. Y. 603; *Cone v. N. Ins. Co.*, 60 id. 619, 624; *Bates v. F. Ins. Co.*, 10 Wall. 33; *B. S. Institution v. C. U. Ins. Co.*, 68 Me. 313; *F. S. Bank v. A. Ins. Co.*, 125 Mass. 431; *W. S. Bank v. C. Ins. Co.*, 29 Conn. 374; *Silas v. R. W. Ins. Co.*, 9 Ins. Law Jour. 154; *Graves v. B. M. Ins. Co.*, 2 Cranch, 419.) The motion for a nonsuit should have been granted upon the ground that no consent was ever obtained from the company, as required by the policy, for the foreclosure of the mortgage upon the property. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 411.) The application of the plaintiff's attorney for consent to the foreclosure was not sufficient. The policy does not require notice to be given but requires consent to be obtained. (*Walsh v. H. F. Ins. Co.*, 73 N. Y. 5; *Marvin v. U. L. Ins. Co.*, 85 id. 278, 282; *Smith v. N. F. Ins. Co.*, 60 Vt. 682.) The trial court and the General Term both held that the foreclosure of the mortgage without consent avoided the policy unless the condition in that respect was waived, and both held that such condition had been waived by the defendant. It is submitted that there is no foundation for such decision. (*Walsh v. H. F. Ins. Co.*, 73 N. Y. 5; *Devens v. M. & T. Ins. Co.*, 83 id. 168; *Wood*

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v. *L. & L. F. Ins. Co.*, 116 id. 118.) The complaint does not allege any waiver of the condition of the policy requiring proofs of loss to be made by the assured, nor of the condition of the policy requiring consent to the foreclosure of the mortgage; but on the contrary the complaint alleges due performance upon the part of the plaintiff of all the conditions of the policy. (*Clift v. Roger*, 25 Hun, 39; *Oakley v. Morton*, 11 N. Y. 25; *Eiseman v. H. Ins. Co.*, 74 Iowa, 11.) Under the plain condition of the policy, and upon the most ample authority, this judgment entered and docketed six days before the fire, without the consent of the company, rendered the policy void. (*Egan v. M. Ins. Co.*, 5 Den. 326; *Merrill v. A. Ins. Co.*, 73 N. Y. 452, 466; *Gould v. H. P. Ins. Co.*, 16 Hun, 538.)

Calvin Frost for respondent. The defendant waived the condition of the policy as to the commencement of foreclosure proceedings without its written consent. (*Titus v. G. F. Ins. Co.*, 80 N. Y. 410; *Goodwin v. M. M. L. Ins. Co.*, 73 id. 480; *Prentice v. K. L. Ins. Co.*, 77 id. 483; *Roby v. A. C. Ins. Co.*, 120 id. 510.) Plaintiff was entitled to make proofs of loss. (*Cornell v. Le Roy*, 9 Wend. 163; *Grosvenor v. A. F. Ins. Co.*, 17 N. Y. 391; *Luckey v. Gannon*, 37 How. Pr. 138; *Pratt v. N. Y. C. Ins. Co.*, 64 Barb. 589; *Nickerson v. Nickerson*, 80 Me. 105; *W. F. Ins. Co. v. G. & B. S. M. Co.*, 41 Mich. 131; *M. Ins. Co. v. Stein*, 5 Bush. 652.)

BROWN, J. This action is upon a policy of insurance against fire issued by the defendant to Daniel Brown, owner. The loss by an indorsement upon the policy was made payable to the plaintiff as mortgagee, and was to be paid "within sixty days after due notice and proof of the same made by the assured."

One of the conditions of the policy was that "if proceedings shall be commenced to foreclose any mortgage upon the insured property, * * * then this entire policy and

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every part thereof shall be null and void, unless the written consent of the company at the New York office is obtained."

On January 6, 1888, the plaintiff commenced an action to foreclose his mortgage without having obtained the company's consent, and by so doing the condition quoted was broken, and the policy was, by its express terms, from that date "null and void." (*Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Devens v. M. & T. Ins. Co.*, 83 id. 168.)

The respondent claims, however, that the breach of this condition was waived, and the trial court and the General Term so determined. It appeared that on February 2, 1888, the plaintiff caused a letter to be written and mailed to the defendant at its New York office, which was delivered in due course of mail, notifying it of said foreclosure action, and that it had been commenced without discovering the clause against it in the policy, and asking consent to continue the action, to which letter no reply was ever made. On February fourth judgment of foreclosure and sale was entered, and on February tenth the buildings were burned.

Daniel Brown, the owner of the property, refused to make proof of loss under the policy, and thereupon such proofs were made by the plaintiff and sent to the defendant; whereupon, on March twenty-fourth, it notified plaintiff by letter that it declined "to accept or receive such papers as a proof of loss under said policy, upon the ground that they are not executed by the assured mentioned in the policy, as required by the conditions of the policy."

Upon receiving such notice plaintiff again solicited said Brown to make proofs of loss, but he declined and an affidavit of such request and declination was sent to the defendant whereupon it replied that it "did not see how these affidavits obviated the objection already made." The finding that there was a waiver of the forfeiture was based upon the failure of the defendant to reply to the letter of February second and upon the demand, implied from the letter of March twenty-fourth, that plaintiff should furnish it with proof of loss made and sworn to by the owner of the property.

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One of the questions considered in *Titus v. Glens Falls Ins. Co.* (*supra*) was similar to the one presented in this case and it was there said that a waiver cannot be inferred from silence. That "the company is not obliged to do or say anything to make a forfeiture effectual." Within the rule there stated the defendant was under no obligation to reply to the plaintiff's letter informing it that the foreclosure suit had been commenced. And I am unable to see how under any rule any legal obligation rested upon the defendant to reply or how it could be inferred from the failure to reply that it intended to waive the enforcement of that condition of the policy. The commencement of the suit rendered the policy from that time void. The plaintiff must be presumed to have known of that fact. He deliberately violated the condition and destroyed his contract and then informed the defendant of his act. It would require some affirmative action on defendant's part under such circumstances to indicate that it intended to waive the result of the plaintiff's breach. We have at this term of the court considered the failure to respond to an application of insurance in its effect upon a contract, and held that a contract could not be presumed under such circumstances (*Moore v. N. Y. Bowery Ins. Co.*), * and no substantial distinction exists in principle between that case and this. The failure to reply to the plaintiff's letter or as was said by the General Term "the neglect to refuse the consent as promptly as the occasion demanded" raised no inference that the defendant consented to the foreclosure action. (*Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5.)

The rule is now established, however, that if in any negotiations or transactions with the assured after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured to do some act or incur some trouble or expense, the forfeiture is waived. (*Titus v. Glens Falls Ins. Co.*, *supra*; *Roby v. Am. Central Ins. Co.*, 120 N. Y. 510; *Pratt v. Dwelling House Mut. Ins. Co.*, 41 N. Y. S. R. 303.)

* *Ante*, page 537.

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While the later decisions all hold that such waiver need not be based upon a technical estoppel, in all the cases where this question is presented, where there has been no express waiver, the fact is recognized that there exists the elements of an estoppel. (*Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108-112; *Goodwin v. Mass. Mut. Life Ins. Co.*, 73 id. 480; *Prentice v. Knickerbocker Life Ins. Co.*, 77 id. 483.)

In the cases cited the plaintiffs were misled by the action of the defendants, and its acts were the cause of the omission to comply with the condition of the policy, the breach of which was alleged as a defense, and under these circumstances the defendants were held to be estopped from asserting the objections.

In *Titus v. Glens Falls Ins. Co.* (*supra*), the defendant required the insured to appear before a person appointed for that purpose and submit to an examination. *Roby v. Am. Central Ins. Co.* was of like character. In those cases the defendant exercised a right which it had only by virtue of the policy, and it was held that exercising a right after knowledge of a breach of one of the conditions of the policy by the assured was a recognition of its validity, and hence a waiver of the forfeiture.

It will be observed, however, none of the things required of the insured in the cases cited were the ordinary contract stipulations, but were to be performed only when requested by the insurer. They were not essential to his cause of action, but were in the nature of an examination into the loss by the assured after service of the formal proofs, and this element points the distinction between those cases and the case at bar.

The condition requiring service of proofs of loss is one wholly for the benefit of the insurer. The assured contracts to perform it, and until he does so, he has no legal claim against the insurer and no cause of action. The proofs thus provided for are the legal evidence of the loss. The performance of the condition is not a thing to be done at the request of the insurer. The company may remain silent, and until proofs are furnished it cannot be called upon to pay the loss.

But the law does require of it entire good faith and fair

Opinion of the Court, per BROWN, J.

dealing in its transactions with the assured in reference to the proofs, and hence it is bound to point out any defects of a formal character therein that the assured may have an opportunity to correct them and if it accepts those served within the time named in the policy it will be deemed to have waived defects and to receive them in performance of the condition of the contract.

I do not think a waiver by the defendant can be inferred from its letter respecting the proofs served. It there made no demand upon the plaintiff. It pointed out to him the fact that in its interpretation of the contract, he was not the assured and the implication was that that term applied to the owner of the property and proofs must be made by him to fulfill the condition of the contract. That this was an act of entire good faith towards the plaintiff is apparent. It required no action from him and put upon him no trouble or expense, but left him free to stand upon his interpretation of the contract if he chose, and it gave him the opportunity if he desired and could do so to remove a possible objection to his claim.

But it is said that the defendant should then have asserted the forfeiture of the policy, and failing to do so, it waived it. But if it had placed its refusal to pay upon that ground, it would not have been permitted thereafter to set up and rely upon defective proofs. A denial of liability and a refusal to pay on the ground that there was no contract would have been equivalent to a declaration that it would not pay though the proofs be furnished. (*Tayloe v. Merchants' Fire Ins. Co.*, 9 How. [U. S.] 390; *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696; *Blake v. Exchange Mut. Ins. Co.*, 12 Gray, 265-272; *Vos v. Robinson*, 9 Johns. 192; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385-401; *Brink v. H. F. Ins. Co.*, 80 N. Y. 108.) So if it had accepted the proofs without objection it would not have been permitted thereafter to have denied that the plaintiff was the assured. (May on Ins. § 468; *Bodle v. Chenango Co. M. Ins. Co.*, 2 N. Y. 53; *Brink v. Hanover F. Ins. Co.*, *supra*.)

So that we have this case. The defendant knowing that a

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claim is to be made upon it intends presumably to assert as a defense a breach of the condition quoted and to demand strict compliance with the condition as to the service of proofs of loss. It had a legal right to take that stand. The plaintiff presented proofs which, according to the company's construction of the contract, were not made by the proper person. What was it to do? If it accepted them it could not thereafter assert that they were not made by the assured. If it asserted that the contract was forfeited, the same result followed. If it refused them on the ground that the plaintiff was not the assured, it waived (so claims the respondent) every defense known to it arising out of the breach of the conditions of the contract by the assured.

How then was it to preserve its rights and enforce both conditions of the policy? Under the rule that thus far has been applied in this case I am unable to see how it could take any action without waiving one or the other of the two conditions. If it received the proofs it lost the right to assert that the owner and not the mortgagor was the assured. If it rejected them the penalty was loss of the right to assert the breach of the condition as to foreclosure. At any rate it could not reject them and demand that proofs be made in accordance with the contract as it interpreted it, without at the same time notifying the assured of its proposed line of defense. But the law imposed no such hardship upon it.

It needs no argument to show that it was justified in standing upon its legal rights and asserting them in the ordinary way and at the proper time, so long as in so doing it did not mislead the plaintiff to his own harm.

It had a right to base its defense to any claim made upon it upon the violation prior to the fire of any provision of the contract, and to require performance by the assured after the fire of those conditions which he had contracted to perform and which were essential to his cause of action and preliminary to the assertion of any claim upon the policy. And in demanding strict compliance with such condition it did not waive any of its rights under the contract.

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It did not mislead the plaintiff or cause or require him to do anything that he did not agree to do.

It has not found fault with the character of the proofs or the matter therein stated or required him to submit oral or written testimony, as was done in *Titus v. Glens Falls Ins. Co.*, and the other cases cited. It asked only the performance of the contract. What it did was in the line of fair dealing, and was beneficial to the plaintiff in enabling him to procure the proofs from the owner, if he could do so, and thereby remove an obstacle to his claim. And there is no fact or circumstance existing in the case tending to show that the plaintiff was prejudiced in his action by anything that the defendant did. If it had, when the proofs were presented, asserted the forfeiture and denied any liability on the contract, that would not have aided him, as he could not have removed the difficulty that confronted him or mitigated in the slightest degree the effect upon the contract of the commencement of the foreclosure action.

To hold, under the circumstances, that the defense was waived, is to extend the rule far beyond that of any reported case.

As has been already said, in every case where a waiver has been implied from the defendant's acts, there has existed something of the element of an estoppel. The plaintiff has been misled to his harm, or the company has done something which could be done only by virtue of the policy, or has required something from the assured which he was bound to do only at the request of the company and which request could only be made under a valid policy.

But none of these elements exist here. The plaintiff was not misled nor has his claim been prejudiced by any act of the defendant, and that which he was required to do was essential under the contract to the assertion of any cause of action upon the policy. Moreover, at the time the proofs were rejected, the loss was not payable and the plaintiff was not in a position to demand payment or bring an action.

By the policy the loss was payable sixty days after service of proofs and until that period elapsed there was no occasion

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or necessity for the defendant to make known whether it intended to pay or contest the claim. How can it be said that the plaintiff, having no right to demand payment, yet had a right to know whether the defendant would or would not pay upon the maturity of the contract, and also to be informed sixty days in advance of his right to sue whether in such a suit the defendant's liability would be denied. Yet such is the result of the rule applied in the case. If such a rule was applicable at all it would seem that the defendant should at least be allowed until the loss is due and payable to determine whether or not it will contest the claim. But no principle of this kind ever was applied to any other contract, and no reason is apparent why it is applicable in cases of this character.

Had the defendant accepted the proofs tendered, there would have been no pretense of a waiver, and there is no rule that works a different result from their rejection.

The conclusion that, under the circumstances disclosed in this case, there was no waiver is in accordance with the authorities. *Phoenix Ins. Co. v. Stevenson* (18 Ky. 160; 8 Ins. Law Journal, 922); *Fitchpatrick v. Hawkeye Ins. Co.* (53 Iowa, 335), are directly in point.

In the first case cited, the policy provided that "if the assured shall have * * * any other insurance on the property herein insured * * * without the consent of the company written thereon, then this policy shall be void."

The condition was broken, but with knowledge of the breach, the company informed the assured that if he had any claim against the company, he should furnish proofs of loss in accordance with the condition of the policy. The Supreme Court of Kentucky held this was not a waiver.

In the Iowa case there was a breach of condition as to occupancy, and, after being informed of that, the company required the assured to present proofs of loss. The court held there was no waiver. That proofs were required in pursuance of the assured's obligation in the policy, and without them plaintiff had no cause of action, and that the requirement of defendant that the assured should discharge his contract obli-

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gation did not estop it from insisting on other conditions of the policy.

In *Desilver v. State Mut. Ins. Co.* (38 Penn. St. 130), it was held that a waiver of notice is not a waiver of the preliminary proof, or of the particular account, when they are made by the policy distinct and separate acts.

In *Titus v. Glens Falls Ins. Co.* (*supra*), it was said the company might wait until claim is made, and then, in denial thereof, or *in defense of a suit*, assert the forfeiture.

In *Brink v. Hanover Ins. Co.* (*supra*), it was said, in speaking of the duty of insurance companies to deal with their customers with fairness: "They may refuse to pay without specifying any ground, but if they plant themselves upon a specified defense, and so notify the assured, they should not be permitted to retract after the latter has acted upon their position as assumed." This language was repeated in *Devens v. M. & T. Ins. Co.* (83 N. Y. 168-173), and it was there said in addition that "the doctrine of waiver should not be extended so as to deprive a party of his defense merely because he negligently or incautiously, when a claim is presented, while denying the liability, omits to disclose his defense, or states another ground than that upon which he finally relies. There must be, in addition, evidence from which the jury would be justified in finding that, with full knowledge of all the facts, there was an intention to abandon, or not to insist upon, the particular defense afterwards relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury."

In that case proofs of loss were served and accepted, and the company, while denying liability, omitted to put its disclaimer upon the breach of warranty afterwards asserted as a defense. The case was stronger for the plaintiff than the one at bar.

Here the plaintiff knew that he had violated the policy in commencing the foreclosure suit, and he was informed just what the defendant claimed as to the proofs of loss. He knew, therefore, just what defenses his claim was liable to meet and

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he was not misled or injured by the defendant's action. But in the case just cited, the defendant placed its disclaimer of liability upon a ground upon which it did not afterwards rely, and the court said this was not inconsistent with an intention to rely upon the defense afterwards made. (See also *Putnam Tool Co. v. Fitchburg Mut. Fire Ins. Co.*, 145 Mass. 265.)

We are of the opinion that there was no waiver by the defendant of the breach of the policy, and for that reason the judgment should be reversed and a new trial granted.

This conclusion renders it unnecessary to consider the other questions in the case.

All concur.

Judgment reversed.

JOHN H. VAN CLIEF et al., Respondents, v. HANNAH R. VAN VECHTEN, Impleaded, etc., Appellant.

Under the Mechanics' Lien Law of 1885 (Chap. 342, Laws of 1885), a lien filed attaches to the *locus in quo* to the extent of any sum then due, or which thereafter becomes due, pursuant to the contract under which the work is being done, or if the contractor abandons the contract without just cause and the owner completes the building in accordance with and under a provision of the contract permitting it, the lien attaches to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed. (FOLLETT, Ch. J., dissenting as to last proposition.)

In an action by a lienor who claims a sum due under the contract, he is under the same obligation to prove performance and to the same extent as would the contractor in an action by him.

Where, therefore, the lienor, in an action to foreclose his lien, claims an installment due, and it appears that the contractor abandoned and willfully refused to perform the contract after due notice, the lienor must show performance of its stipulations entitling the contractor to the payment, without any omission so substantial in its character as to call for an allowance of damages if he had acted in good faith.

In such an action it appeared that after the contractor abandoned the work, the owner, as authorized by the contract, completed the building herself, although not required so to do, and although she had threatened to cancel it. In her answer the owner asked to have the amount expended by her in completing the building to be allowed as a set-off or counterclaim.

Held (FOLLETT, Ch. J., dissenting), that it was to be presumed that the

130	571
132	21
132	582

130	571
136	619

130	571
139	347

130	571
142	617

130	571
149	444
f 149	561

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155	544

130	571
162	490

130	571
a163	226

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work so done by her was under the contract, and that it thus continued operative through her action; that the amount paid by her for this purpose was in legal effect paid for the contractor and the difference between the sum thus expended and the amount unpaid on the contract became due under it, and to the extent of that sum plaintiffs' lien attached.

The action to foreclose the lien was commenced in a County Court; the lien was for \$1,670.10. The complaint was amended on trial so as to demand only \$800. It was claimed by the owner that the court did not have jurisdiction. *Held*, that as there was nothing in the summons to show what the action was brought for, it being under the Code of Civil Procedure of the same form in all cases (§§ 416, 418), the court acquired jurisdiction when it was served and had power to amend the complaint. *McIntyre v. Carriere* (17 Hun, 64), distinguished.

Reported below, 55 Hun, 467.

(Argued December 7, 1891; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 14, 1890, which affirmed a judgment in favor of the plaintiffs entered upon the report of a referee.

This action was brought in the County Court of Richmond county for the foreclosure of a mechanic's lien.

On the 31st of March, 1886, the defendant Smalle agreed to furnish the materials and erect a building for the defendant Van Vechten for the sum of \$4,298, less \$275, for a fire-place, heater and furnace, making the net price \$4,023, payable \$1,000 when the building was sheathed; \$1,000 when the exterior was finished; \$800 when the plastering was finished, and the balance when the entire work was completed, such payments to be made upon the certificate of the architect in charge. The work was to be completed by the 15th of October, 1886, and if incomplete at that time, said contractor was to forfeit \$10 a day for every day that the building continued unfinished. The contract also provided that if the contractor at any time during the progress of the work should refuse or neglect to supply a sufficiency of materials or workmen, the owner should have power, after three days' notice in writing, to provide materials and workmen and finish the work and that the expense should be deducted from the contract price.

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Smalle entered upon the performance of his contract and was paid by Mrs. Van Vechten \$1,000, June 1, 1886, and \$1,000, July 27, 1886.

The plaintiffs furnished materials worth \$1,264.35 to Smalle, that were used in the building, and other materials worth \$405.75 to the defendants Newman, who were sub-contractors with Smalle, that were also used in the building. On the 17th of September, 1886, and within ninety days after such materials had been so furnished and used, the plaintiffs filed a notice of lien, in the usual form, under the General Mechanic's Lien Act of 1885. September 22, 1886, Smalle abandoned his contract, leaving the building incomplete, and refused further performance, although notified by Mrs. Van Vechten to go on with the work and that in default thereof she "would cancel and forfeit said contract and make other arrangements to complete the building." After such refusal Mrs. Van Vechten furnished materials and employed workmen to finish the building at an expense of \$1,905.20. The work was thus completed February 15, 1887, and the same was done under the direction of the architect mentioned in the original contract and according to the plans and specifications named therein. Smalle demanded no payment of the owner after July 27, 1886, and served no answer in this action.

The referee found that when the lien was filed "Smalle had earned and there was remaining unpaid to him on account of said contract the sum of \$900, and at that time the plastering upon said building was substantially finished and there was due and unpaid Smalle under said contract the sum of \$800 over and above all payments theretofore made to him thereon by defendant Van Vechten." He refused upon due request to allow anything to Mrs. Van Vechten on account of the sum paid by her to complete the building after its abandonment by Smalle, although she had demanded in her answer to be allowed that sum as a set-off. Judgment of foreclosure was rendered for the sum of \$800, with interest thereon from September 17, 1886. Upon the trial the complaint was amended so as to conform to the proof and to demand only \$800, besides interest,

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and thus bring the claim within the conceded jurisdiction of the County Court.

The General Term held that, although nothing was due under the contract, as between contractor and owner, still as the property of the lienors had been used in the building and the owner had received value therefor over and above her payments, to the extent of \$800 and interest, the judgment should be affirmed.

Ezekiel Fixman for appellant. The only judgment or relief which the plaintiff could have as against the owner, is for the sum which was due pursuant to the terms of the contract from the owner to the contractor at the time of the filing of the sub-contractor's lien, or that which became due subsequently. (*Cook v. O. F. F. Union*, 49 Hun, 23; *Cheney v. Troy Hospital*, 65 N. Y. 282; *Crane v. Genin*, 60 id. 127; *Rodbourn v. S. L. G. & W. Co.*, 67 id. 213; *Lombard v. S. B. & N. Y. R. R. Co.*, 55 id. 491; *Sullivan v. Brewster*, 1 E. D. Smith, 681; *Spaulding v. King*, Id. 718; *Ferguson v. Burk*, 4 id. 767; *Rudd v. Davis*, 1 Hill, 277; *Smith v. Coe*, 2 Hilt. 365; 29 N. Y. 669; *Baily v. Johnston*, 1 Daly, 61-67; *Cox v. Broderick*, 4 E. D. Smith, 721; *Haswell v. Goodchild*, 12 Wend. 373.) Nothing was due and unpaid under the terms of the contract from the owner to the contractor at the time the plaintiffs filed their notice of claim or lien, as was held by the General Term, and from this it follows, and it should be held that the said notice of claim or lien so filed by the plaintiffs was ineffectual to charge the defendant Van Vechten's property and this action cannot be maintained against her. (*Wyckoff v. Meyers*, 44 N. Y. 145; *McMahon v. N. Y. & E. R. R. Co.*, 20 id. 463; *B. N. Bank v. Mayor*, 63 id. 339; *Smith v. Brady*, 17 id. 176; *U. S. v. Robeson*, 9 Pet. 319; *Thomas v. Floery*, 26 N. Y. 26; *Smith v. Wright*, 4 Hun, 652; 39 N. Y. 380; *Handley v. Walker*, 8 Lawy. 207; *Larkin v. McMullen*, 120 Minn. 206.) Plaintiffs did not by filing their notice of claim acquire a valid or effectual lien against the defendant Van Vechten's property, and this action

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should be dismissed. (*Morgan v. Stevens*, 6 Abb. [N. C.] 356; *O'Donnell v. Rosenberg*, 14 Abb. [N. S.] 59; *Crane v. Genin*, 60 N. Y. 130; *Larkin v. McMullen*, 120 id. 206; *Cunningham v. Jones*, 4 Abb. Pr. 433; 20 N. Y. 486; *Smith v. Brady*, 17 id. 173; *Glacius v. Black*, 50 id. 145; *Finn v. O'Hara*, 2 E. D. Smith, 560; *Prouser v. Florence*, 4 Abb. [N. C.] 136; *Crane v. Genin*, 60 N. Y. 127; *Murphy v. Bruckman*, 66 id. 297; *Wheeler v. Schofield*, 67 id. 311; *Taylor v. Mayor, etc.*, 83 id. 625; *Crawford v. Becker*, 13 Hun, 375.) Defendant Van Vechten has a good and valid counter-claim as against the plaintiffs, and all the defendants who filed liens, and that sum should be allowed to the defendant Van Vechten and deducted from the contract price, or from any sum that was due when plaintiffs filed their lien, in the event that it is held that the contract was not forfeited by Smalle's default. (*Murphy v. Bruckman*, 66 N. Y. 297; *Heckman v. Pinkney*, 81 id. 211; *Taylor v. Mayor, etc.*, 83 id. 625; *Crawford v. Becker*, 13 Hun, 375; *Smith v. Ferris*, 1 Daly, 18; *Rodbourn v. S. L. G. & W. Co.*, 67 N. Y. 215; *Larkin v. McMullen*, 120 id. 206.) The owner Van Vechten may for the purpose of reducing or defeating the claim in this action, avail herself of all matters allowable by way of recoupment or counter-claim arising out of the contract between the owner and the contractor, and which would be available against the contractor in an action by him, the right of the parties being determined by the facts existing at the time of the creation of the lien. (*Cheney v. T. H. Assn.*, 60 N. Y. 281; *Morgan v. Stevens*, 6 Abb. [N. C.] 363; *O'Donnell v. Rosenberg*, 14 Abb. Pr. [N. S.] 59; *Miller v. Moore*, 1 E. D. Smith, 739; *Hoyt v. Hill Miner*, 7 Hilt. 525; *Develin v. Mack*, 2 Daly, 100; *Gourdier v. Thorp*, 1 E. D. Smith, 698; *Heckman v. Pinckney*, 81 N. Y. 211; *Larkin v. McMullen*, 120 id. 206; *Crawford v. Becker*, 13 Hun, 375.) The finding of the referee that \$2,900 was earned, is not supported by the proofs, and the exception to it was well taken. (*Bedlow v. N. Y. F. D. D. Co.*, 112 N. Y. 263; *Sheldon v. Sheldon*, 51 id. 354; *Kennedy v. Porter*, 109 id. 526; *Wright*

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v. *Roberts*, 43 Hun, 113.) The County Court had no jurisdiction of the subject-matter of this action. (Code Civ. Pro. §§ 340, 499; 1 Rumsey's Pr. 53; *Avery v. Willis*, 24 Hun, 348; *Gilbert v. York*, 111 N. Y. 544; *Lenyard v. Lynch*, 62 How. Pr. 56; Laws of 1870, chap. 467, § 1; Laws of 1880, chap. 480; *Robinson v. O. S. N. Co.*, 111 N. Y. 316; *Davidsburgh v. K. L. Ins. Co.*, 80 id. 526; *Wheelock v. Lee*, 74 id. 495.) Plaintiffs have not proven a cause of action upon which the defendant Van Vechten is in any way personally liable, or for which her property could be made subject to the notice of claim or lien of the plaintiffs, or of any of the other defendants. (Laws of 1885, chap. 348.)

David Thornton for respondents. Plaintiffs were entitled to the sum of \$800, not only unpaid, but actually earned under the contract. (*Wright v. Roberts*, 43 Hun, 413; *Heckman v. Pinkney*, 81 N. Y. 211; *Graf v. Cunningham*, 109 id. 369; *Sheffield v. Leffler*, 3 N. Y. Supp. 150.) Even if it were as claimed by defendant, that the owner's liability was only to the extent of the amount payable by the terms of the contract to Smalle at the time of the filing of the lien, the plaintiffs' recovery was proper. (*Graf v. Cunningham*, 109 N. Y. 369.) The question of jurisdiction of the County Court of the subject-matter of this action, raised by defendant, was properly determined by the county judge, the referee and General Term herein. (*Sweet v. Flanagan*, 61 How. Pr. 327.) Having once acquired jurisdiction of the action by the service of the summons, it is within the power of the court to amend the complaint or other proceedings. (*McIntyre v. Currier*, 17 Hun, 64; *Dwyer v. Rathbone*, 17 N. Y. S. R. 443; *Campbell v. Mandeville*, 110 N. Y. 628.) The question of residence of the owner, Van Vechten, was not raised until after the trial was completed before the second referee. It was then too late. It was not taken by demurrer or answer, and was waived. (*McMahon v. Sherman*, 14 N. Y. S. R. 637; Code Civ. Pro. § 499.)

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VANN, J. The statute applicable to the subject of this action is chapter 342 of the Laws of 1885, as it stood before it was amended by chapter 316 of the Laws of 1888. As we construe that statute and read the decisions made thereunder, as well as those made under similar statutes, we think that the following rules determine the extent to which a mechanics' lien, filed by a sub-contractor or a material-man, attaches to the *locus in quo*:

1. If anything is due to the contractor, pursuant to the terms of the contract, when the lien is filed, it attaches to that extent.

2. If nothing is due to the contractor according to the contract, when the lien is filed, but a certain amount subsequently becomes due thereunder, the lien attaches to the extent of that sum.

3. If nothing is due to the contractor pursuant to the contract, when the lien is filed and he abandons the undertaking without just cause, but the owner completes the building according to the contract and under a provision thereof permitting it, the lien attaches to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed. (*Larkin v. McMullin*, 120 N. Y. 206; *Powers v. City of Yonkers*, 114 id. 145; *Mayor, etc., v. Crawford*, 111 id. 638; *Graf v. Cunningham*, 109 id. 369; *Taylor v. Mayor, etc.*, 83 id. 625; *Heckmann v. Pinkney*, 81 id. 211; *Gibson v. Lenane*, 94 id. 183; *Rodbourn v. Seneca Lake Grape & Wine Co.*, 67 id. 215; *Lombard v. Syracuse, B. & N. Y. R. Co.*, 55 id. 491; 15 Am. & Eng. Encyc. 78, 84.)

The first question presented for decision is whether there was anything due from the owner to the contractor, according to the terms of the contract, when the lien was filed. This depends on whether there is any evidence to support the finding of the referee that the plastering had been substantially finished at the time of the filing of the lien, for according to the contract, the third payment of \$800 was to become due when the work had progressed to that extent. Evidence was given in behalf of the owner tending to show that it was worth

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\$200 to complete the plastering, and that the mason who did it was paid that amount. The witnesses for the plaintiffs, however, testified that it was worth much less. As the conflict in the evidence raised a question of fact, the version most favorable to the plaintiffs and most strongly tending to sustain the finding of the referee must be accepted as that upon which he acted.

The only witnesses for the plaintiffs as to the quantity or value of the unfinished plastering were the defendants Newman, who as sub-contractors with Smalle, were engaged in doing the mason work when the lien was filed, and they stopped work on that account. One of these gentlemen testified in substance that the cornice had not been run nor the last coat put on the main hall; that the stairs were not up, "so it was not plastered under the stairs;" that he could not say that the plastering was all done in the second-story hall; that "it was not finished, that is, it had not the last coat;" and that it would cost from \$20 to \$25 to complete the plastering in the hall. The other sub-contractor testified that the last coat on the side walls of the parlor and the last coat in the entrance hall was not on and about forty feet of cornice work had not been run; that the stairs were not wholly up and not plastered; that the plastering was not done in the second-story hall, "and of course, the plastering was not on all the stairs;" "I have said four times there was no plastering done under the stair-cases and in the hall;" that it was worth about \$30 to finish the plastering.

All of the witnesses for the defendant testified that there was more plastering to be done, and that it would cost more than the sub-contractors stated in their testimony.

Although the referee found that the sum of \$200 was paid for completing the plastering, he refused to find that it was fairly and reasonably worth that amount. The learned General Term apparently held that the plastering was not finished, because they say in their opinion that "as between contractor and owner, nothing was due under the contract." The third payment of \$800 was not simply for the plastering, but for the plastering and all other work that necessarily preceded it,

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after the completion of the exterior, which made the second payment due. The cost of completing the stairs must be added to the cost of completing the plastering, for the latter could not be done until the former had been done. The question of substantial performance depends somewhat on the good faith of the contractor. If he has intended and tried to comply with the contract and has succeeded, except as to some slight things omitted by inadvertence, he will be allowed to recover the contract price, less the amount necessary to fully compensate the owner for the damages sustained by the omission. (*Woodward v. Fuller*, 80 N. Y. 312; *Nolan v. Whitney*, 81 id. 648; *Phillip v. Gallant*, 62 id. 256, 264; *Glacius v. Black*, 50 id. 145; *S. C.*, 67 id. 563, 566; *Johnson v. DePeyster*, 50 id. 666; *Sinclair v. Tallmadge*, 35 Barb. 602.)

But when, as in this case, there is a willful refusal by the contractor to perform his contract and he wholly abandons it, and after due notice refuses to have anything more to do with it, his right to recover depends upon performance of his contract, without any omission so substantial in its character as to call for an allowance of damages if he had acted in good faith. While slight and insignificant imperfections or deviations may be overlooked on the principle of *de minimis non curat lex*, the contract in other respects must be performed according to its terms. When the refusal to proceed is willful the difference between substantial and literal performance is bounded by the line of *de minimis*. (*Smith v. Brady*, 17 N. Y. 173; *Cunningham v. Jones*, 20 id. 486; *Bonesteel v. Mayor, etc.*, 22 id. 162; *Walker v. Millard*, 29 id. 375; *Glacius v. Black*, 50 id. 145; *Catlin v. Tobies*, 26 id. 217; *Husted v. Craig*, 36 id. 221; *Flaherty v. Miner*, 123 id. 382; Hare on Contracts, 569; Leake on Contracts, 821.)

In this sense the plastering was not substantially finished and there is no evidence to support the finding of the referee in that regard, for when three coats are required two will not suffice. That is not substantially finished which requires a substantial sum to finish it. The referee found that the contractor wholly abandoned work upon said building and left it

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incomplete and exposed to the elements, and that he refused, after due notice from the owner to perform his contract, to go on with the work or finish the building. The abandonment was willful and the omission to perform intentional, and under those circumstances, according to the authorities, substantial performance is not sufficient, except when it is understood as excluding only such unsubstantial differences as the parties are presumed not to have had in contemplation when they made the contract.

The plaintiffs claim through the contractor, and if the third payment was not due as to him it was not due as to them. They are under the same obligation to prove performance and to the same extent that he would be. Their rights as lienors are measured by his rights under the contract. We think that there was nothing due upon the contract when the lien was filed, and that the judgment cannot be supported on that ground.

The owner, however, although under no obligation to do so, completed the building herself, according to the contract, which thus continued operative through her action. After the contractor refused to proceed she performed the contract for him, as it expressly permitted her to do. As her action was according to the contract, it will be presumed, under all the circumstances and in support of the judgment, that it was under the contract. While she threatened to cancel it, there is neither finding, nor request to find, that she did cancel it, and instead of pleading a cancellation or rescission in her answer, she asked to have the amount expended by her to complete the building "allowed as a set-off or counter-claim to any claim of the said defendant Smalle or the plaintiffs herein, or of any of the other defendants herein, in case the court should eventually determine that the said defendant Smalle is entitled to any sum whatsoever under the said contract." Upon the trial her counsel said: "We claim that we completed this building after the contractor had abandoned his work and have a right to set off what we paid for the completion of this building. That is claimed as a set-off against this claim and

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as a counter-claim." She testified that after Smalle stopped work she had a conversation with one McDowell about taking the contract to complete the house; that McDowell's firm made a written proposition "to finish the incomplete work;" that when Mr. McDowell handed her this paper she had a talk with him "in regard to his taking up the contract to complete the house," and that subsequently she accepted said proposition to complete the house in accordance with the plans and specifications and paid the new contractors accordingly. The amount paid by her for this purpose, in legal effect, was paid for the original contractor. The difference between the sum thus expended and the aggregate amount unpaid on the contract with Smalle upon the completion of the entire work, became due under the contract. (*Graf v. Cunningham, supra.*) To the extent of that sum, being the difference between \$2,023 and \$1,905.20, the lien of the plaintiffs attached, and they are entitled to a foreclosure for that amount, provided the County Court had jurisdiction of the action.

As the action was brought to foreclose a lien for the sum of \$1,670.10, the appellant claims that the County Court had no jurisdiction. (L. 1885, ch. 342, § 7.) The respondents defend the jurisdiction of the court under chapter 480 of the Laws of 1880. They insist that, although that act purported to amend an act that had already been repealed, it has the effect of an original enactment. (L. 1870, ch. 467; L. 1877, ch. 417; L. 1880, ch. 245; L. 1880, ch. 480.) They further insist that the legislature has express constitutional power to thus increase the jurisdiction of the County Courts. (Cons. St. of N. Y. art. 6, § 15; *Sweet v. Flannagan*, 61 How. Pr. 327.)

While we have considered, we do not decide this question, as the jurisdiction of the court, to the extent that it was exercised, can be justified on another ground.

A civil action is commenced by the service of a summons, which, under the present practice, is of the same form in all cases. (Code C. P. §§ 416, 418.) As there was nothing in the summons to show what the action was brought for, the court acquired jurisdiction when it was served, and hence had

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power to amend the complaint, if it demanded judgment for too large an amount.

In *McIntyre v. Carriere* (17 Hun, 64), the summons was in the old form of a summons for money, and showed upon its face that the amount claimed exceeded the jurisdiction of the court. It was held that, as the summons itself showed a want of jurisdiction, the court had no power to amend. But in *McDonald v. Truesdail* (Id. 65), the summons was for relief, under the former practice, and it was held that the court acquired jurisdiction by the service of a summons, free from objections, and had power to amend the complaint by reducing the demand for judgment to one thousand dollars.

In *Gilbert v. York* (41 Hun, 594), the complaint failed to allege the residence of the parties, and it was held demurrable for that reason, but the General Term allowed an amendment upon terms. See also *Dwyer v. Rathbone* (17 N. Y. St. Rep. 443), and *Yagor v. Hannah* (6 Hill, 631, 634).

The judgment should be reversed and a new trial granted, with costs to abide the event, unless the plaintiffs, within thirty days, stipulate to reduce the amount due and unpaid upon their lien to the sum of \$117.80, with interest thereon from September 17, 1886, in which event the judgment as thus modified should be affirmed, without costs in this court to either party.

FOLLETT, Ch. J. (dissenting). The result reached by the prevailing opinion is based on this provision in the contract:

“Should the contractor, at any time during the progress of the said works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have the power to provide materials and workmen, after three days’ notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract.”

At the request of the defendant, the following facts were found:

(6) “That the said defendant Smalle never performed the conditions or covenants in the said contract between him and

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the defendant Van Vechten, contracted, covenanted and agreed to be performed by him, nor did the said defendant ever complete or finish the said work on said building, nor comply with the terms of said contract, but that on the 22d day of September, 1886, the said defendant Smalle wholly abandoned work in and upon said building, and left the said building in an incomplete and unfinished state, and exposed to the elements, and refused and neglected to complete and finish said building, and to perform the conditions and agreements of said contract on his part, although he was duly notified by the said defendant Van Vechten to perform his said contract with her."

(7) "That the said defendant Smalle having so abandoned the work on said building, and having so refused and neglected to perform and carry out his said contract with the defendant Van Vechten, the said defendant Van Vechten duly notified the said Smalle to perform his said contract, and that in default thereof the defendant Van Vechten would cancel and forfeit said contract, and make other arrangements to complete the building, and the said Smalle having failed and neglected to proceed with the erection of said building, the said defendant Van Vechten after giving such notice, and after such default on the part of said Smalle, employed other workmen to finish and complete the said building, and also furnished the materials necessary to finish and complete the said building."

(13) "That the work in completing and finishing said building was done and performed under the direction of said E. A. Sergeant (the architect), and according to the plans and specifications mentioned in said contract."

The prevailing opinion assumes that the thirteenth finding is to the effect that the owner had not rescinded the contract, but completed the building under it. I am unable to give this finding such a construction, because the three findings must be construed together, and so read, the result of the facts found is that the contract had been abandoned by the contractor, and rescinded and declared at an end by the owner, who went on and completed the building according to the

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specifications mentioned in the contract. It cannot be that in case an owner contracts to have a building erected according to plans and specifications forming a part of the contract, and the contractor half completes the structure and then abandons it, and declares that he is unable, as he did in this case, to perform his contract, and the owner rescinds it and goes on and completes the building according to the original plans, that it is proof that the work was done in performance of and under the original contract.

Such a construction would compel the owner to change the plans upon which the structure had been partially built, in order to escape the inference that he was proceeding under a contract which had been voluntarily abandoned by the contractor and declared to be at an end by the owner.

I am unable to concur in the third proposition in the prevailing opinion: "(3) If nothing is due to the contractor, pursuant to the contract, when the lien is filed, and he abandons the undertaking without just cause, but the owner completes the building according to the contract and under a provision thereof permitting it, the lien attaches to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed."

Graf v. Cunningham (109 N. Y. 369), which is principally relied upon to support the proposition, does not seem to be in point. In that case the contractor had not, but the owner had, failed to perform the contract, and the latter completed the building for \$170 less than she would have been compelled to pay had the contractor been permitted to complete the building under the contract. Under these circumstances, a material-man who had furnished material to the contractor and duly filed a lien, was held entitled to recover that sum. In that case the contractor had a cause of action against the owner under the contract, and the damages which he was entitled to recover were subject to the liens of persons performing work or furnishing materials for him.

In the present case the contractor had no claim against the owner, and there being nothing due or to become due the con-

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tractor, there was nothing to which a lien could attach. (*Rodbourn v. S. L. G. & Wine Co.*, 67 N. Y. 215.) In the absence of fraud or collusion, a lienor cannot recover from the owner more than is unpaid, due and to become due on the contract; and it being conceded that the contractor could not have recovered any sum under this contract, I am unable to see how the lienor, whose lien could only attach to the contractor's interest, has established a cause of action.

The words of the statute are: "But in no case shall such owner be liable to pay, by reason of all the liens filed pursuant to this act, a greater sum than the price stipulated and agreed to be paid in such contract, and remaining unpaid at the time of filing such lien, or in case there is no contract than the amount of the value of such labor and material then remaining unpaid, except as hereinafter provided." (§ 1, chap. 342, Laws of 1885.)

The judgment should be reversed.

All concur with VANN, J., except FOLLETT, Ch. J., dissenting.
Judgment accordingly.

ELLIS H. ROBERTS & Co., v. GEORGE F. VIETOR et al.,
Impleaded, etc., Appellants, PATRICK F. BULGER, as
Assignee, etc., Respondent.

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The inventory or schedule required by the General Assignment Act (§ 8, chap. 466, Laws of 1877), to be made and filed by a debtor making an assignment, is to be read in connection with the assignment and as part of the transaction.

Where the assignor prefers a creditor for a specified amount, made up of several items of indebtedness which the assignee is directed to pay, and it appears that some of the items were either paid at the time of the assignment or that the indebtedness never existed, the assignment is, as matter of law, fraudulent and void as to creditors.

Neither the assignee nor a creditor coming in under the assignment has power to question the validity of the items preferred, and whatever may have been in fact the motive of the assignor, he is presumed to have intended the consequences of his acts, and the effect of the preference

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is to defraud general creditors to the extent such preference is in excess of the amount in fact owing.

Where, therefore, in an action to set aside such an assignment the referee, while finding the facts of the non-existence of certain items of preferred indebtedness, also found that the assignment was made in good faith, with no intent to hinder, delay or defraud creditors, *held*, that this did not remove the imputation of fraud or validate the assignment.

An assignment contained among the preferences an alleged indebtedness to M. to the amount of "about \$12,000," besides interest upon "accounts and notes which the assignors are unable to describe." The assignment then gave the items, with dates for interest, closing with the statement, "as near as assignors are able to state," the whole indebtedness amounting to \$13,501.70. The assignors filed an inventory, which described the indebtedness to M. as \$12,000, accounts and notes, and then gave the items, as specified in the assignment, without any qualifying words. The referee found that of the items specified, those amounting to \$7,500 were either paid or no such indebtedness existed, but that the assignors were indebted to M. in other items, making a total indebtedness, including interest, of \$12,656.38; that the assignment was made in good faith, with no intent to defraud; and that, as a conclusion therefrom, the preference was valid to the amount last specified. *Held* error; that the inventory fixed specifically the amount of the indebtedness and the items preferred; but that assuming it was the indebtedness to M., not the particular items, which was preferred, and that a mistake in giving the items would not avoid the assignment, as the preference was to a substantial amount in excess of the actual indebtedness, the assignment was so far fraudulent, and this vitiated the whole instrument.

Kavanagh v. Beckwith (44 Barb. 192), distinguished.

The action was brought by plaintiff on behalf of himself and other creditors who desired to join. Two attachment creditors whose claims were admitted by the inventory, were made defendants. They answered, admitting the allegations of the complaint as to fraud and joined with the plaintiff in the action. The judgment sustained the assignment and required said creditors to turn over the property attached to the assignee. *Held*, that said creditors had the right to appeal.

Roberts v. Victor (55 Hun, 461), reversed.

(Argued December 22, 1891; decided February 9, 1892.)

APPEAL by Vietor and Achilles from a judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 26, 1889, which affirmed a judgment in favor of defendant Bulger entered upon the report of a referee.

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The nature of the action and the facts, so far as material are stated in the opinion.

George F. Danforth for appellants. Upon the facts found by the referee and upon uncontradicted evidence, the assignment was fraudulent and void. (Laws of 1877, chap. 406, § 1; *Hardman v. Bowen*, 39 N. Y. 196; *Britton v. Lorenz*, 45 id. 51; *Frazer v. Truax*, 27 Hun, 587; *In re Lewis*, 81 N. Y. 421; *Ogden v. Peters*, 21 id. 23; *Jessup v. Hulse*, Id. 168; *In re Dewey*, 10 Daly, 66; *Cunningham v. Cunningham*, 1 Ves. 522; *Lewin on Trusts*, 118; Laws of 1877, chap. 466, § 3; *Chapin v. Thompson*, 89 N. Y. 279.) The theory on which the referee reconstructed the assignment has no precedent in law or reason. (*Knight v. Bunn*, 7 Iredell, Eq. 77; *Leavitt v. Palmer*, 3 N. Y. 19; *Grover v. Wakeman*, 11 Wend. 187; *Mackie v. Cairnes*, 5 Cow. 547.) The construction adopted by the referee apparently is that the debt due Major, no matter how represented, was, when finally ascertained, the debt preferred, and in that he erred. (*Griffin v. Marquadt*, 21 N. Y. 123; *Platt v. Lott*, 16 id. 478; *In re Lewis*, 81 id. 424; *Holmes v. Hubbard*, 60 id. 185.)

William Kernan and *James Dunne* for appellants Vietor. The assignment is void on its face, in that it gives a preference to "L. Cohn, agent, or individually," and thereby fails to specify the creditor intended to be preferred. (*Frazer v. Truax*, 27 Hun, 584; *Chapin v. Thompson*, 89 N. Y. 280; *In re Lewis*, 81 id. 424.) The preference to Adelia J. Sparks is fraudulent and void as against the creditors of Buckley & Co., the assignors. (109 N. Y. 333; *Pars. on Part.* [2d ed.] 438, 447; *Durant v. Pierson*, 58 Hun, 190; 124 N. Y. 444; *Nordlinger v. Anderson*, 123 id. 544; *Bernheimer v. Rindskopf*, 116 id. 428; *Loos v. Wilkinson*, 110 id. 195, 209; *Starin v. Kelly*, 88 id. 118; *Talcott v. Hess*, 31 Hun, 282; *Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 id. 165; *Bulger v. Rosa*, 119 id. 465; *Bump on Fraud. Conv.* [3d ed.] §§ 271, 272, 314-324.) The preference to Chloe Spencer

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renders the assignment fraudulent and void. (*Newman v. Cordell*, 43 Barb. 448; Bishop on Insol. Debt. [2d ed.] 217; *Loos v. Wilkinson*, 110 N. Y. 195, 209; *Starin v. Kelly*, 88 id. 418; Bump on Fraud. Conv. § 280; *Menagh v. Whitwell*, 52 N. Y. 152.) The fact as found by the referee that the assignors have stated "they had a surplus of \$40,000, and that no losses have been shown to have accrued to Buckley & Co. to wipe out such surplus between the date of such statement" and the making of the assignment, is sufficient to show a fraudulent disposition of property on the part of the assignors. (Whart. on Ev. § 1289; Waite on Fraud. Conv. §§ 6, 7, 224; Bump on Fraud. Conv. §§ 38, 39, 50, 51, 54, 81, 83; *Bonnell v. Griswold*, 89 N. Y. 122; *Bennet v. Bates*, 94 id. 354, 367; *Health Dept. v. Purdon*, 99 id. 237, 243; *Mackie v. Cairnes*, 5 Cow. 547; *D'Ivernois v. Leavitt*, 23 Barb. 64.) Preferential assignments, though tolerated, are regarded with extreme disfavor. (*Sutherland v. Bradner*, 39 Hun, 134; 116 N. Y. 410; *Mills v. Parkhurst*, 124 id. 89; Burrill on Assign. §§ 255, 256, 263, 264; *Barnum v. Hempstead*, 7 Paige, 568, 572; *Brainerd v. Dunning*, 20 N. Y. 214; *Brown v. Guthrie*, 39 Hun, 31; *Frazer v. Truax*, 27 id. 587; *Chapin v. Thompson*, 89 N. Y. 270; *Pratt v. Allen*, 7 Paige, 627; *Bank of Rochester v. Emerson*, 10 id. 359; *Burchard v. Phillips*, 11 id. 66.) To affirm the action of the referee with respect to such substitution of items in an assignment, would make the most glaring frauds easy of accomplishment. (*Salisbury v. Howe*, 87 N. Y. 134.) The preferences in the assignment to Daniel G. Major of the items of "October 4, 1883, \$500;" "February 1, 1884, \$1,000," and of "February 10, 1884, \$3,000," are fraudulent. (*N. Bank v. Ingraham*, 58 Barb. 290; *Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 id. 146.) The preference to Daniel G. Major of the \$1,500 for money loaned as of August 8, 1883, which was duly paid December 11, 1883, is a fraudulent preference. (Story's Eq. Juris. § 193; *Tabor v. Van Tassel*, 86 N. Y. 642; *Loos v. Wilkinson*, 110 id. 175, 209; *Starin v. Kelly*, 88 id. 418; *Talcott v. Hess*, 31 Hun, 282; Burrill on Assign. [5th ed.] § 337; Id. 156; *Simons v.*

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Goldbach, 56 Hun, 204, 205, 207; 123 N. Y. 637; *Bank of Westport v. Raymond*, 14 N. Y. S. R. 868, 871; *Bank of Champlain v. Wood*, 45 Hun, 411, 415; *Chandler v. Powers*, 9 N. Y. S. R. 169; *In re McCallum*, 10 Daly, 72; *Cohen v. Irion*, 26 N. Y. S. R. 1, 2.) The direction in the assignment to pay Daniel G. Major, by way of preference, \$910.62 in excess of what the referee finds to be due, is an illegal direction with respect to the assigned estate, and invalidates the whole assignment. (*Simons v. Goldbach*, 123 N. Y. 637.) The judgment in favor of D. G. Major, is wholly fraudulent and void, and the referee had no power to amend it by reducing it to the actual indebtedness. (*Acker v. Leland*, 109 N. Y. 5, 16; *Simons v. Goldbach*, 123 id. 627.) Assuming that the judgment is absolutely void, the appellants respectfully insist that neither the court below nor the referee had the power to amend the judgment. (*Smith v. Mayor, etc.*, 37 N. Y. 518; *Egert v. Wicker*, 10 How. Pr. 193; *Wolfe v. Schmenger*, 12 Civ. Pro. Rep. 312; *Adams v. Ash*, 46 Hun, 105, 110; *McLean v. Stewart*, 14 id. 472; *Rockwell v. Carpenter*, 25 id. 529.) Should the judgment be modified, as directed by the referee, the lien of Major's judgment and execution should be postponed to the liens of the contesting creditors. (*Symson v. Silheimer*, 40 Hun, 116; 105 N. Y. 620.) An attaching creditor is not a creditor at large after the writ is served, but a creditor having a specific lien upon the goods attached, and through the sheriff, if attacked, can show that the assignee's title was fraudulent as against him. (*Rinchey v. Stryker*, 28 N. Y. 45; *Lux v. Davidson*, 54 Hun, 345, 346; *Carr v. Van Hoesen*, 26 id. 316; *Bowe v. Arnold*, 31 id. 259.)

W. A. Matteson for judgment creditors. The judgment in favor of Sparks, is legal and valid. (*Voorhees v. Childs*, 17 N. Y. 354; *Riper v. Poppenhausen*, 43 id. 74; *Richter v. Poppenhausen*, 42 id. 376; *Pope v. Cole*, 55 id. 127; *Arnold v. Camp*, 12 Johns. 409; *Waydell v. Luer*, 3 Den. 410; *Millerd v. Horn*, 56 N. Y. 406; *Dodd v. Ross*, 17 Hun, 600; *R. S. Bank v. Kramer*, 32 id. 270.) The claim of Mrs. Chloe

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Spencer and judgment recovered thereon are perfectly established. The preference of the claim of Daniel G. Major, which was put in judgment, was valid. (*Denton v. Merrell*, 43 Hun, 228; *Church v. Sparrow*, 5 Wend. 223; *O. Bank v. Hennesy*, 48 N. Y. 551; *O. C. Bank v. De Puy*, 17 Wend. 47; *Miller v. Manice*, 6 Hill, 115; *Hoover v. Greenbaum*, 61 N. Y. 311; *Smith v. Post*, 1 Hun, 518; *Jaiger v. Kelly*, 52 N. Y. 275; *Dudley v. Danforth*, 61 id. 626; *Townsend v. Stearns*, 32 id. 214; *Schults v. Hoagland*, 85 id. 467; *Baird v. Mayor, etc.*, 96 id. 592; *Lorillard v. Clyde*, 86 id. 387.) Defendants Vietor and Achilles asked to prosecute the action further on their own account. Under our objection this was allowed to be done by the referee. The defendants and appellants stand, therefore, in the attitude of plaintiffs prosecuting this action. To entitle them to maintain such an action they must be armed with a judgment recovered for their claim, and with an execution issued thereon returned unsatisfied. (*Reubens v. Jewell*, 13 N. Y. 488; *Estes v. Wilcox*, 67 id. 264; *Addie v. Bigler*, 81 id. 349.)

Wm. P. Quinn for respondent. The assignment was valid. (*Bagley v. Bowe*, 105 N. Y. 171; *Ginther v. Richmond*, 18 Hun, 232, 234; *Rapallee v. Stewart*, 27 N. Y. 315; *Benedict v. Huntington*, 32 id. 219; *Townsend v. Sterns*, Id. 209; *Crook v. Rindskopf*, 105 id. 485; *Grover v. Wakeman*, 11 Wend. 188; Penal Code, § 586; *People v. Briggs*, 114 N. Y. 56; *N. Y. & B. F. Co. v. Moore*, 102 id. 667; *Aldridge v. Aldridge*, 120 id. 614, 616; *Travis v. Travis*, 122 id. 449; *Billings v. Russell*, 101 id. 226-228.) The facts found by the referee having been affirmed by the General Term will be accepted as conclusive on this appeal. (*Flack v. Vill. of Green Island*, 122 N. Y. 107-117; *People ex rel. v. French*, 123 id. 636; *Healy v. Clark*, 120 id. 642; *Ensign v. Ensign*, Id. 655.) If additional facts were necessary for the affirmance of the judgment they would be presumed on this appeal to have been moved upon the trial. (*E. C. F. Co. v. Hersee*, 103 N. Y. 25; *Reese v. Boese*, 94 id.

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623; *Flack v. Village of Green Island*, 122 id. 107.) It was necessary for the appellants to secure a finding of a fraudulent intent as a matter of fact. A conclusion of law to that effect without its having been found as a fact would have been unavailing. (*Robbins v. Mount*, 55 Hun, 80; *Billings v. Russell*, 101 N. Y. 226, 229; *Smith v. Perine*, 121 id. 376, 381; *Kavanagh v. Beckwith*, 44 Barb. 194.) All the preferences are of the copartnership debts and not the creditors. (*Griffith v. Marquardt*, 21 N. Y. 121, 123; *Bank of Silver Creek v. Talcott*, 22 Barb. 550; *Brainerd v. Dunning*, 30 N. Y. 211; *Maack v. Maack*, 49 Hun, 507; *Burley v. Hartson*, 40 id. 121, 123; *Richardson v. Thurber*, 104 N. Y. 606; *Fay v. Grant*, 53 Hun, 44; *Turner v. Jaycox*, 40 N. Y. 470; *Bogart v. Haight*, 9 Paige, 297; *Hurlburt v. Dean*, 2 Keyes, 97.) The debts of Chloe Spencer and Adelia J. Sparks were valid firm debts. (*Turner v. Jaycox*, 40 N. Y. 470; *Livermore v. Northrup*, 44 id. 107; *Murray v. Judson*, 9 id. 73; *Bernheimer v. Rindskopf*, 116 N. Y. 428; *Smith v. Perine*, 121 id. 376; *Kavanagh v. Beckwith*, 44 Barb. 196; 36 Hun, 136; *Brown v. Halsted*, 17 Abb. [N. C.] 205; *Crook v. Rindskopf*, 105 N. Y. 482.) Statements of the assignors made before the assignment, to be any evidence against the assignee, must be part of the *res gestæ*, either of the assignment itself or of some act which is evidence of a fraudulent intent in making the assignment. (*Baldwin v. Short*, 125 N. Y. 553, 557; *Pool v. Ellison*, 56 Hun, 108, 111; *Vidvard v. Powers*, 34 id. 221; *Von Sachs v. Kretz*, 72 N. Y. 548; *Truax v. Slater*, 86 id. 630; *Flagler v. Wheeler*, 40 Hun, 125; *Bullis v. Montgomery*, 50 N. Y. 352; *Tabor v. Van Tassell*, 86 id. 642; *Tilson v. Terwilliger*, 56 id. 273; *Adams v. Davidson*, 10 id. 309; *Loos v. Wilkinson*, 110 id. 195; *Talcott v. Rosenthal*, 22 Hun, 573; *Tim v. Smith*, 13 Abb. [N. C.] 31; *Hoover v. Greenbaum*, 61 N. Y. 305; *Shultz v. Hoagland*, 85 id. 468.) The advice of the counsel who prepared the assignment and schedules is a sufficient answer to any criticism on the preference and the statements in the assignment and schedules. (*Kavanagh v. Beckwith*, 44 Barb. 197; *Everson*

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v. *City of Syracuse*, 110 N. Y. 574, 584; *Burnap v. N. Bank*, 96 id. 125.) Every fact necessary to sustain the judgment, not inconsistent with the referee's findings, will be assumed to have been proved upon the trial. No argument can be made by the appellants upon the judgments obtained by the preferred creditors. (*Gutman v. McNulty*, 22 Wkly. Dig. 241; 5 Cow. 547.) The failure to keep books of account is not a ground for setting aside an assignment. (*Kavanagh v. Beckwith*, 44 Barb. 197.) The burden of proof was upon the appellants and did not shift during the trial. (*Heineman v. Heard*, 62 N. Y. 448; *Hobart v. Hobart*, Id. 80; *Fountain v. Pettee*, 38 Hun, 184; *Bergman v. Jones*, 94 N. Y. 51; *Kennedy v. Thorp*, 51 id. 174.) The judgment conformed with the decision, except as to matters to which the appellants consented. No questions can be reviewed on appeal in relation thereto. (*Burr v. De La Vergne*, 102 N. Y. 417.)

HAIGHT, J. This action was brought by the plaintiff, a domestic corporation, as a judgment creditor in behalf of itself and all other creditors of the firm of Buckley & Co., who might desire to join in the action to set aside as fraudulent a general assignment for the benefit of creditors made by the members of the firm of Buckley & Co., as such, and as individuals, to Patrick F. Bulger; and also to set aside as fraudulent certain judgments entered in favor of Thomas Wheeler, Daniel G. Major and Chloe Spencer against Buckley & Co.

The firm of Buckley & Co. and the members thereof were insolvent. The assignment was executed and delivered on the 17th of March, 1886. In it the assignee is described as the party of the second part.

It provides that: "Fifth. After the payment in full of all of the copartnership debts designated in Schedules A and B, as above directed, the said party of the second part *shall pay* all and singular the copartnership debts set forth and enumerated in the schedule hereto annexed, marked C, *in full with interest.*"

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"Sixth. After the payment *in full* of the copartnership debts set forth in Schedules A, B and C., as above directed, the said party of the second part shall pay all and singular the copartnership debts set forth in a schedule hereto annexed, marked D, with interest."

Schedule C referred to and forming a part of the attached assignment contains a statement of the names of the creditors, third named, as preferred in the assignment, the general nature of such indebtedness and the amount thereof. In it appears the following:

"Name of creditor, Daniel G. Major; residence, Washington, D. C.; consideration, money loaned; form of debt, accounts and notes which assignors are unable to describe.

" Amount about.....	\$12, 000	
" Date for interest.....	1, 000	Jan. 12, 1883.
	1, 500	Aug. 8, 1883.
	500	Oct. 4, 1884.
	1, 000	Feb. 4, 1884.
	3, 000	Feb. 10, 1884.
	5, 000	May 23, 1884.

" as near as assignors are able to state."

On the 7th day of April, 1886, John Buckley and William E. Shirley, as such assignors, filed their inventory and schedules duly verified as required by law, and amongst the firm debts set out by them in the schedule so filed is an indebtedness to Daniel G. Major, which is described as follows:

" Daniel G. Major, Washington, D. C., \$12, 000.

" Accounts and Notes:

" Jan. 12, 1883.....	\$1, 000
" Aug. 8, 1883.....	1, 500
" Oct. 4, 1883..... money loaned	500
" Feb. 1, 1884.....	1, 000
" Feb. 10, 1884.....	3, 000
" May 23, 1884	5, 000 "

Major was a brother in law of the assignor John Buckley,
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and the amount of his claim so preferred, with interest, was the sum of \$13,501.70.

The referee has found the following facts:

“Fifteenth. That at the date of the making, execution and delivery of said assignment, the item of \$1,500, August 8, 1883, so preferred in said assignment and set out in said schedules, had been paid off and discharged, the same having been paid by Buckley & Co. to Daniel G. Major, by check of Buckley & Co. on the Oneida County Bank, to the order of Daniel G. Major, dated December 11, 1883, for \$1,530.75, which check was duly paid Daniel G. Major by said Oneida County Bank and said check being given for \$1,500 as the principal and \$30.75 as the interest due on said loan of August 8, 1883.”

“Sixteenth. That at the time of the making, executing and delivery of said assignment the following items so preferred therein on behalf of Daniel G. Major, viz., \$1,000, January 12, 1883; \$5,000, May 23, 1884, formed no part of the items of indebtedness then due or owing by Buckley & Co. to Daniel G. Major, nor do the said items, or either of them, appear upon the books of Buckley & Co. as amounts due by their firm to Daniel G. Major.”

The referee further found as facts that “the indebtedness of Buckley & Co. to Daniel G. Major on the 17th day of March, 1886, including interest, to be as follows:

“Note dated Feb. 26, 1883, on demand, with interest, for.....	\$1,000 00
“Interest on same	183 50
“Note dated June 1, 1883, on demand, with interest, for.....	1,000 00
“Interest on same	167 67
“Note dated Oct. 4, 1883, on demand, with interest, for.....	500 00
“Interest on same	73 58
“Note dated January 31, 1884, on demand, with interest, for.....	1,000 00
“Interest on same	127 67

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" Note dated Feb. 12, 1884, in one year, with interest, for.....	\$3,000 00
" Interest on same	377 50
" Note dated May 6, 1884, on demand, with interest, for.....	3,000 00
" Interest on same	335 50
" Cash advanced by check, May 6, 1884.....	500 00
" Interest on same	55 91
" Cash advanced to pay note given for accommodation of Buckley & Co., May 17, 1884.....	2,538 75
" Interest on same	279 27
" Making a total of	<u>\$14,139 35</u>

" As against this claim there are credits of money paid to Major from time to time by Buckley & Co., as follows, viz. :

" June 6, 1884, by check	\$1,000 00
" Interest to March 17, 1886	106 83
" October, 1884, by cash.....	100 00
" Interest thereon.....	8 50
" December 18, 1884, by check	50 00
" Interest.....	3 74
" November 15, 1884, by check.....	50 00
" Interest.....	4 02
" February 5, 1885, by two checks	100 00
" Interest.....	6 70
" February 25, 1885, by check.....	50 00
" Interest.....	3 18
" Making a total credit	<u>\$1,482 97</u>
" Leaving a total debit	<u>\$12,656 38"</u>

He further found that the assignment was made in good faith, with no intent to hinder, delay or defraud creditors; and, as a conclusion of law, that the preference in the assignment of the debt of Major was a valid preference to the amount of \$12,656.38.

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It also appears in the facts found by the referee that Major brought action against Buckley and Shirley upon his claim for money loaned, etc., and that on the eighteenth day of March, the day after the assignment, the defendants appeared by M. W. Van Auken, their attorney, and made an offer of judgment, and that such offer was accepted and thereupon judgment was entered for \$13,501.70 damages and \$19.39 costs, being for the same items and amount for which he was preferred in the assignment.

The referee found that the recovery should only have been for the sum of \$12,658.24; that for that amount with costs it was a good and valid judgment and might be enforced.

It will be observed that of the items of the claim so preferred that of \$1,500 of August 8, 1883, was fully paid and satisfied on the eleventh of December thereafter, and that of \$1,000, January 12, 1883, and \$5,000, May 23, 1884, had no existence in fact, making a total of \$7,500 that was fictitious at the time the assignment was made.

It is contended, however, that it was the indebtedness of Major that was preferred, and not the items making up such indebtedness, and that a mistake in giving the items should not avoid the assignment, provided that other items of indebtedness in fact existed. This view would deprive the other creditors of the advantage given them by the statute of knowing "the true cause and consideration" of the claim, but without assenting to the correctness of the proposition we may for the purposes of this argument assume it to be sound. The fact still remains that the amount actually owing Major falls short of the amount preferred in the sum of \$845.32.

The statute provides that "a debtor making an assignment shall at the date thereof, or within twenty days thereafter, cause to be made and delivered to the clerk of the county where such assignment is recorded an inventory or schedule containing * * * 3. A full and true account of all the creditors of such debtor, stating the last known place of residence of each, the sum owing to each, with the true cause and consideration therefor, and a full statement of any existing

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security for the payment of the same." (4 R. S. [8th ed.] 2537, § 3.)

Pursuant to this provision the assignors made and filed their inventory or schedule in which the same items were described as accounts and notes as then owing to Major, without any qualifying words. The inventory must be regarded as part of the transaction and is to be read in connection with the assignment in respect to the matters which it is required by law to contain. (Burrell on Assignments, § 151; *Terry v. Butler*, 43 Barb. 395; *Kavanagh v. Beckwith*, 44 Barb. 192-197.)

The assignment in describing the form of the debt states that it is accounts and notes *which assignors are unable to describe*, and amount due *about* \$12,000, and after giving the items is added, "as near as assignors are able to state."

As we have seen, the inventory was filed twenty days thereafter, and in it the amount and items are stated without qualifying words, thus indicating that at that time the assignors were possessed of the requisite information to correctly describe them. This inventory we are to read in connection with the assignment, and so reading the instruments, we think that it is apparent that the assignors not only have, but intended to absolutely and unqualifiedly prefer the claim of Major to the amount stated. This view is strengthened from the provisions of the assignment referred to, for they require the payment of "all and singular, the copartnership debts set forth and enumerated in the schedule hereto annexed, marked 'C' in full, with interest," and that is to be done before any payment can be made of the claims enumerated in Schedule "D," or other subsequent schedules, for it is only after the payment in full of the debts set forth in Schedule "C," that the assignee is directed to pay those in Schedule "D." We thus have the positive and unqualified direction to pay Major's debt in full, with interest, as set forth and enumerated in the schedule. As to this payment, the assignee is given no discretion.

In the *Matter of the Assignment of Lewis* (81 N. Y. 421, 424), FINCH, J., in delivering the opinion of the court, says: "The assignee derives all his power from the assignment,

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which is both the guide and measure of his duty. Beyond that, or outside of its terms, he is powerless and without authority. The control of the court over his actions is limited the same way, and can only be exercised to compel his performance of a stipulated and defined trust, and protect the rights which flow from it. He distributes the proceeds of the estate placed in his care, according to the dictation and under the sole guidance of the assignment, and the statutory provisions merely regulate and guard his exercise of an authority derived from the will of the assignor. The courts, therefore, cannot direct him to pay a debt of the assignor, or give it preference, in violation of the terms of the same, and the right of creditors under it. To hold the contrary would be to put the court in the place of the assignor, and assert a right to modify the terms of the assignment, after it had taken effect, against the will of its maker, and to the injury of those protected by it. We agree that the assignee is merely the representative of the debtor, and must be governed by the express terms of his trust."

In the case of *Chapin v. Thompson* (89 N. Y. 270), it was held that the assignee could not modify or change the provisions of the assignment, or prevent the payment of a debt provided for in the assignment, even if it was usurious.

In the *Matter of the Assignment of Ward* (10 Daly, 66), it was held that the duty of the assignee for the benefit of creditors is to uphold his trust, not to impeach it; that he cannot object to the payment of a creditor preferred in the assignment, even upon the ground that the claim is fraudulent.

Bishop on Insolvent Debtors, section 359, says: "A general assignment for the benefit of creditors, by its own terms devotes the debtor's property to the payment of some or all of the assignor's debts, and the debts provided for may be specified in the instrument itself, or they may be left to be otherwise determined. When the assignment provides for the payment of specific debts, neither the assignee nor any creditor claiming under the assignment can dispute their validity. (*Pratt v. Adams*, 7 Paige, 615; *Jewett v. Wood-*

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ward, 1 Edward's Ch. 195; *Green v. Morse*, 4 Barb. 332; *Maynard v. Maynard*, 4 Edward's Ch. 711.)

"The question is one of intent, to be gathered from a fair construction of the deed of assignment. If the assignee is directed to pay certain persons upon certain specified amounts, either with priorities or proportionately, the assignee who accepts the trust and all the creditors who come in and share under it, are bound by the provisions of the deed and cannot dispute them. This proposition which rests on the doctrines of election, that he who accepts a benefit under an instrument cannot dispute the validity of its provisions, is abundantly sustained by the authorities. * * * If the claims so provided for are fictitious or fraudulent, or such as for any reason ought not to be paid, that will be a ground for setting the assignment aside as fraudulent and void, but it will not furnish a ground upon which a creditor claiming under the assignment as a valid instrument can dispute the claim of another creditor provided for in the same manner in the same instrument." (*Nicholson v. Leavitt*, 6 N. Y. 519; *Green v. Morse*, 4 Barb. 332, 342; *Knower v. Central National Bank*, 124 N. Y. 552-558; *Maack v. Maack*, 49 Hun, 507; *Pratt v. Adams*, 7 Paige, 615, 641.)

In the case of *Kavanagh v. Beckwith* (*supra*), it was held in the General Term that the assignee was not bound to pay the debts at the amount stated in the assignment. The assignment in that case required the assignee to pay "the debts due or to grow due from the assignor *for which he is liable*." The amount in the assignment was over-stated, but the true amount was stated by the assignor in the inventory subsequently filed by him. Reading the inventory in connection with the assignment, which required the assignee to only pay the amount for which the assignor was liable, and that true amount appearing in the inventory, presented a very different question from that in the case under consideration.

The rule to which we have referred may have no application to the general and unpreferred creditors, especially when as in this case, the assignment provides that in case there shall

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be any remainder after paying the preferred creditors in full that the other creditors may be paid the amount that may be *owing* to them respectively. The amount of their claims is not specified and the assignee is left to determine the same, but as we have seen it is very different with the favored creditors.

If, therefore, the assignee was required to pay the amount of Major's claim as stated and described, it would of necessity follow that the general creditors would be defrauded in the amount that such preference was in excess of that which was in fact owing.

The referee has said that the assignment was made in good faith and without intent to hinder, delay or defraud the creditors, but the provisions of the assignment carried out deprives the general creditors of this sum, and the rule is that every party must be deemed to have intended the natural and inevitable consequences of his acts and where his acts are voluntary and necessarily operate to defraud others he must be deemed to have intended the fraud.

In the case of *Coleman v. Burr* (93 N. Y. 17-31), the referee found that the transaction was fair and honest. He, however, found facts from which the inference of fraud was inevitable. It was held on review that his characterizing the transaction as fair and honest did not make them innocent or change their essential character in the eye of the law; that he must be deemed to have intended to hinder, delay and defraud his creditors. (*Cunningham v. Freeborn*, 11 Wendell, 241-252; *Ford v. Williams*, 24 N. Y. 359; *Edgell v. Hart*, 9 id. 213; *Wilson v. Robertson*, 21 id. 587-593.)

It may be said that the excessive preference was small in amount. Undoubtedly innocent errors of small amounts resulting in no material loss to the creditors may be disregarded, but in this case the excess is of a substantial amount and if paid over to Major would result in a material loss to the unfavored creditors.

If the assignment is fraudulent in part, the whole instrument is void. (*Mackie v. Cairns*, 5 Cow. 547; *Grover v.*

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Wakeman, 11 Wend. 187-225; *Simons v. Goldbach*, 56 Hun, 204; affirmed, 123 N. Y. 657; *Russell v. Winne*, 37 N. Y. 591.)

No relief by way of a reformation of the assignment was asked for in the pleadings, and we are consequently not called upon to determine whether a court of equity would entertain such an action.

The appeal was properly brought by Vietor and Achilles. They were attaching creditors, and the amount of their claim is admitted by the inventory filed. The action was brought by the plaintiff on behalf of itself and all other creditors of the firm who desired to join with it in the action. Vietor and Achilles were made defendants and answered, admitting the allegations of the complaint as to charges of fraud by Buckley & Co., and joined with the plaintiff in the action. The judgment took from them the benefit they claim through their attachment on the property of the assignors, and required them to turn it over to the assignee. They consequently had the right to appeal.

We have not thought it advisable to consider or discuss at this time the questions that arise upon the modification of the Major judgment, for upon a new trial evidence may be produced materially changing the facts.

We think the evidence supports the findings of the referee as to the claims of Adelia J. Sparks and Chloe Spencer, but are unable to find authority permitting him to change the assignment as to the amount directed to be paid to Daniel G. Major.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except FOLLETT, Ch. J., and VANN, J., dissenting.
Judgment reversed.

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In the Matter of the Application for the Removal from Office
of THOMAS S. KING, as Police Justice, etc.

Under the provision of the Judiciary Act (§ 25, chap. 280, Laws of 1847), as amended in 1880 (§ 1, chap. 354, Laws of 1880), in reference to the removal of justices of the peace, etc., which gives the court power in a proceeding for that purpose to certify and tax certain "reasonable expenses," the same to "be a charge against the city, town or village within which such justice of the peace," etc., resides, the court has no power, at least in a proceeding instituted after the passage of the amendatory act, to certify and tax counsel fees and disbursements; the power of the court is limited to an allowance of "the reasonable expenses of the referee."

Where, in such a proceeding, upon coming in of the report of the referee, the proceedings were dismissed, and upon application of both the complainant and respondent, the court certified and taxed the counsel fees and disbursements of both parties, *held*, that the portion of the order making these allowances was reviewable here on appeal by the city wherein the justice resided.

Prior to the appeal all of the items taxed were paid by direction of the common council of the city, except the sum taxed as the fees and disbursements of complainant's counsel. The appeal was "from the whole and every part of said order certifying and taxing the expenses of the reference herein." *Held*, that the notice of appeal was too broad. The order appealed from, therefore, modified by striking out the item so unpaid, but without costs of appeal.

(Argued January 20, 1892; decided February 9, 1892.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 11, 1889, which certified and taxed the expenses of a reference under chapter 354 of the Laws of 1880. Also motion by Calvin S. Crosser, the complainant, for leave to withdraw his appeal from that part of said order which dismissed the proceeding.

In 1888, Calvin S. Crosser presented to the General Term charges of official misconduct against Thomas S. King, as police justice of the city of Buffalo, who appeared and denied the same. An order was thereupon made appointing a referee to take the proofs, and upon the report of the referee, including the evidence taken, the court found that the respondent

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was not guilty of the charges preferred, and dismissed the proceedings. (25 N. Y. S. R. 792.) In the same order, upon the application of both the complainant and respondent, the court certified and taxed "the reasonable expenses of such reference * * * at the sum of \$4,057.35," and directed that the same be paid as follows, viz. : To the referee, \$408.35 ; to the stenographer, \$499 ; to the counsel for the respondent, Thomas S. King, "for counsel fees and disbursements," \$1,550 ; to the counsel for the complainant, Calvin S. Crosser, "for counsel fees and disbursements upon such reference," \$1,600. All of said sums, except the last, were subsequently paid by direction of the common council of the city of Buffalo, but, notwithstanding, this appeal was taken by the city from the order allowing all of the items, without distinction.

The motion by Mr. Crosser for leave to withdraw his appeal from that part of said order which dismissed the proceeding, is based upon the fact that since the appeal was taken, said Thomas S. King has been re-elected to the office of police justice of said city.

Philip A. Laing and George M. Browne for appellant. The General Term should not have required the city of Buffalo to pay the costs of the parties instituting these proceedings. (Laws of 1880, chap. 354 ; Const. N. Y. art. 6, § 18 ; Laws of 1847, chap. 280, § 25.)

L. L. Lewis, Jr., for respondent. The motion of complainant for leave to withdraw his appeal and to dismiss the appeal of the city of Buffalo should be granted. (Const. N. Y. art. 6, § 18 ; Code Crim. Pro. § 132 ; Laws of 1880, chap. 354 ; Laws of 1847, chap. 280, § 25 ; *Crosby v. Stephan*, 97 N. Y. 606 ; *E. L. A. Society v. Hughes*, 125 id. 116.)

VANN, J. While the Constitution authorizes the removal from office of "justices of the peace and judges or justices of inferior courts not of record," by such courts as may be prescribed by law, it contains no provision for the allowance of

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the costs or expenses of the proceeding. (Cons. St. of N. Y. art. 6, § 18.) We have been referred to no statute that is claimed to authorize the action of the learned General Term in taxing and certifying the amount allowed to compensate counsel, except the following section of the Judiciary Act of 1847, as subsequently amended :

“Justices of the peace and judges, and justices of inferior courts, not of record, and their clerks, may be removed as provided by the Constitution, by the Supreme Court at any General Term thereof, and such General Term shall have power to order the proofs upon any proceedings hereunder to be taken before a referee to be appointed by such General Term, and to certify the reasonable expenses of such referee, which amount so certified, and also the reasonable expenses of any reference as heretofore or hereafter taxed by any General Term of said court, under proceedings heretofore taken under the act hereby amended and remaining unpaid, is hereby declared to be a charge against the city, town or village within which such justice of the peace, judge or justice of inferior court, not of record, or clerk, exercises the duties of his office. Such General Term may also in its discretion require the person or persons instituting proceedings for the removal of either of the officials above named to give security to be approved by such General Term for the expenses incident to the hearing and determination thereof, in case the charges against such official are not sustained.” (L. 1847, ch. 280, § 25, as amended by L. 1880, ch. 354, § 1.)

The part in italics is the original section, the rest having been added by the amendment. An analysis of the section shows that the Supreme Court, at any General Term, has power to appoint a referee to take the proofs in a proceeding to remove one of the officers named, and “to certify the reasonable expenses of such referee, which amount, so certified,” is made a charge against the city, town or village within which such officer exercised the duties of his office. It is further provided that “the reasonable expenses of any reference, as heretofore or hereafter taxed by any General Term of said

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court, *under proceedings heretofore taken under the act hereby amended,*” shall also be a charge upon the city, town or village in question. Until the section was amended it gave the court no power to appoint a referee or to allow his expenses. By the amendment that power was conferred upon the court and the practice thus regulated as to all proceedings that should be instituted after the amendment went into effect. But the legislature was doubtless aware that for a long time it had been the practice of the court, under its general powers, to appoint referees in such proceedings, so it went a step farther and authorized the court to tax the reasonable expenses of any reference “under proceedings heretofore taken under the act hereby amended.” Thus provision was made for the taxation of the expenses of any reference that should be ordered in the future, as well as for any that had been ordered in the past. As this would have required a re-taxation of the expenses of references previously had, when they had already been taxed, the legislature dispensed with that formality by providing that the expenses theretofore taxed, as well as those thereafter to be taxed, should be a charge upon the municipality interested. The statute as thus read, provides for the payment of the expenses: (1) of such references as should be ordered in the future; (2) of such as had been ordered, but the expenses had not been taxed, and (3) of such as had been ordered and the expenses had already been taxed. We think that it was the design of the legislature to limit the expenses to be allowed, whether in past or future references, to the compensation and disbursements of the referee, and that the phrase “reasonable expenses of any reference,” when the context is considered, means the same as the “reasonable expenses of the referee.” In the absence of express language, it would be unreasonable to suppose that the legislature intended to allow counsel fees in references previously ordered, without its express authority, and to withhold them in references to be ordered, pursuant to its direct authorization. But, however this may be “the reasonable expenses of any reference” whether “heretofore or hereafter taxed,” are expressly confined to proceedings

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taken before the act was amended. The words "under proceedings heretofore taken under the act hereby amended," necessarily refer to references previously had, because they would be inconsistent and absurd if they referred to references not yet ordered, or even authorized. "Proceedings heretofore taken," mean such as were instituted before the amendment was passed, while "proceedings hereunder to be taken" mean such as should be instituted after the amendment was passed. The proceeding in question comes within the latter class, because it was not commenced until some years after the amendment went into effect. It is controlled, therefore, by that part of the section which empowers the General Term to certify "the reasonable expenses of the referee." Even if the subsequent provision as to "the reasonable expenses of any reference" has a more extended meaning, it has no application to the case in hand. We think, therefore, that the learned General Term inadvertently exceeded its power when it certified and taxed the counsel fees and disbursements of the parties to the proceeding and directed the payment of the same.

We also think that we have jurisdiction to review that part of the order appealed from by the city of Buffalo, at least, because it was a final order, affecting a substantial right, made in a special proceeding. (Code Civ. Pro. §§ 190, 3333, 3334; *Re N. Y., W. S. & B. R. R. Co.*, 94 N. Y. 287; *Bergen v. Carman*, 79 id. 146; *Sturgis v. Spofford*, 58 id. 103; *McGregor v. Comstock*, 19 id. 581.)

The appeal involves the power of the General Term to make any allowance for the compensation of counsel, not its discretion as to the amount that should be allowed, provided it had jurisdiction to allow anything for that purpose. No question as to the allowance of costs, as such, to be paid by one party to another, is presented, but simply the power to certify and tax certain sums for the benefit of counsel, which sums, when thus certified and taxed, are declared by statute a charge against the municipal corporation where the officer sought to be removed discharged the functions of his office. The statute regards the complainant as a party to the proceeding, because it authorizes

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the General Term to require him to give security for the expenses incident to the hearing and determination of the charges. The proceeding was, therefore, a prosecution by a party within the meaning of section 3334 of the Code, although, as public interests were involved, he would not be allowed to discontinue the same without leave of the court.

We think that the order appealed from should be modified by striking out that part which taxes and certifies the sum of \$1,600 as counsel fees and disbursements for the complainant, but without costs, because the notice of appeal was too broad inasmuch as it was "from the whole and every part of said order, certifying and taxing the expenses of the reference herein."

The motion of the complainant for leave to withdraw his appeal from the adjudication of the General Term upon the merits of the controversy, should be granted, because the points involved have become abstract questions by reason of events transpiring since the appeal was taken. As this motion is not opposed, it is granted without costs.

All concur, except HAIGHT, J., not voting.

Ordered accordingly.

EMILY F. DINGLEY, Respondent, v. ISADORE M. BON,
Appellant.

An unrecorded conveyance of real estate is not void as against a subsequent purchaser, although for a valuable consideration, who had notice at the time of his purchase of the unrecorded deed; he cannot claim the benefit of the Recording Act.

A purchaser of real estate is entitled to a marketable title free from reasonable doubt.

Specific performance of his contract will not be decreed where the title depends upon a disputed question of fact, outside of the record, about which there is reasonable doubt, and when the parties interested therein are not before the court.

In an action to compel the specific performance of a contract for the purchase of land, the following facts appeared: The premises were conveyed in 1854 by J. & G. to H., by deeds which recited that the grantors had

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conveyed portions thereof to L., S. & B. and taken back from them mortgages thereon and that the grantors intended to convey their interests in the premises and in said mortgages. Plaintiff took title under said deeds. No deed to L., S. or B. appeared on record. Plaintiff claimed that the recitals in said deeds only amounted to constructive notice, casting upon the purchaser the duty of ascertaining from the records as to the conveyances referred to, and as the records disclosed nothing, the purchaser took an absolute title in fee. *Held*, untenable; and that plaintiff's title was not free from reasonable doubt.

It appeared that K., plaintiff's grantor, contracted to purchase the premises, but refused to perform his contract because of the recitals in the deeds to H. Thereupon an action to compel specific performance was brought against K. which resulted in a judgment for specific performance; K.'s objections being overruled upon the ground that it appeared the recitals in the deeds were not true in fact, that no deeds were ever given to L., S. or B. but simply executory contracts, which were subsequently canceled and surrendered. K. thereupon took title. *Held*, that as neither L., S. nor B. were made parties to said action, they were not bound by the judgment, and it was not binding upon defendant.

Sanders v. Townshend (89 N. Y. 623); *Dow v. Whitney* (147 Mass. 1), distinguished.

(Argued January 20, 1892; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 10, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Herman F. Koepke for appellant. The finding of facts "that the defendant is unable to ascertain whether any or what part of the land described in the complaint has been conveyed to" Langston et al., is conclusive against the respondent on this appeal to show that if the defendant was chargeable with notice of the outstanding deeds he was unable to find out anything about them and consequently could safely complete the purchase for the reason that he would take the title freed from the effects of notice. (Whart. Leg. Max. 89.) The recital operated at most as notice of certain outstanding conveyances.

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(*Nellis v. Munson*, 108 N. Y. 461; *Sanders v. Townshend*, 89 id. 623.) The absence of a hostile record or possession after a lapse of time freed the title from the effects of the notice. (*Birdsall v. Russell*, 29 N. Y. 250; *Page v. Waring*, 76 id. 471; Willard on Real Estate [2d ed.], 121; *Acer v. Westcott*, 46 N. Y. 392; *Rogers v. Jones*, 8 N. H. 264.) The plaintiff is protected in her title by the Recording Acts. (1 R. S. 756; *Wood v. Chapin*, 13 N. Y. 509; *Hayes v. Nourse*, 114 id. 606.) The title is such a one as a court of equity should compel a purchaser to take. (*Ferry v. Sampson*, 112 N. Y. 415; *W. P. I. Co. v. Reymert*, 45 id. 703; *Nellis v. Munson*, 108 id. 461; *Chamberlain v. Sparger*, 86 id. 606; *Daw v. Whitney*, 147 Mass. 1; *Moser v. Cochran*, 107 N. Y. 41.)

Johnson & Lamb for respondent. Where, from a description in a deed, the amount of land sought to be conveyed cannot be ascertained, no title passes. (*Raynor v. Timerson*, 46 Barb. 518; *Hathway v. Power*, 6 Hill, 453; *Jackson v. Clark*, 7 Johns. 217; *Finley v. Cook*, 54 Barb. 9; *Jackson v. Marsh*, 6 Cow. 281; *Jackson v. Roosevelt*, 12 Johns. 97; *Jackson v. Delancey*, 13 id. 537; *Jackson v. Ransom*, 18 id. 107.) Conceding that possession sometimes cures defects in the title, nowhere has it ever been held that a vendee can be compelled to take and pay, as for a merchantable title, where there is neither a title of record nor a title by prescription. (*Schrivver v. Schriver*, 86 id. 575; *Post v. Bernheim*, 31 Hun, 247.) The evidence in the Harrison record is obviously collusive, and the whole suit an obvious sham, and a silly attempt to make a record against parties who were not present, who were not cited, and who did not have their day in court. (*Schrivver v. Schriver*, 86 N. Y. 584.) Under the contract made between the parties to this action, the defendant can insist on a marketable title, one not open to reasonable objections. If there is a reasonable doubt about this title, specific performance should not be compelled. (*M. E. C. Home v. Thompson*, 108 N. Y. 618; *Ferry v. Sampson*, 112 id. 415; *Toole v. Toole*, Id. 333; *Abbott v. James*, 111 id. 673.)

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HAIGHT, J. This action was brought to compel the specific performance of a contract to purchase land.

The defense was that the title was not merchantable.

Peter A. Delmonico was the owner of a tract of land in the city of Brooklyn, comprising the land in question. On the 11th day of March, 1854, he conveyed the same to Henry Jukes and Job Gothard. On the twenty-sixth of September thereafter they conveyed the same to James Hordern by separate deeds, each of an undivided half, which were identical in form, containing the same recitals. The quotations hereinafter made are taken from the Jukes deed. It contained the following:

“WHEREAS, The said Henry Jukes and Job Gothard afterwards by deeds sold and conveyed certain portions of the entirety of the premises hereinafter described to John Langston, Jubal Shaw and Samuel Bailey by separate deeds of conveyances, and took back from the said John Langston, Jubal Shaw and Samuel Bailey severally, bonds and mortgages for the respective payments of the several sums therein mentioned as securities and for the purchase monies thereof, reference to the several deeds being thereunto had will more fully appear; and

“WHEREAS, The party of the second part has agreed to purchase of the said Henry Jukes his portion of the entirety of the premises hereinafter mentioned, subject, however, to the several equities aforesaid.”

Then follows the ordinary provisions of a deed, with a description of the premises, after which appears the following:

“Nevertheless, it is hereby understood by and between the parties hereto that the said Henry Jukes, as far as in him is, not only conveys his right, title and interest in and to the premises aforesaid, but hereby sells, assigns and confirms unto the said James Hordern, all and singular the said bonds and mortgages as far as the moiety of his interest in the premises aforesaid attaches made by the said John Langston, Jubal Shaw, Samuel Bailey, to him the said Henry Jukes and the said Job Gothard for security on their said several purchases

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of portions of the property aforesaid, and all his right and interest therein and thereto, so that the said James Hordern shall stand in every respect and particular regarding the aforesaid property in the place and stead, and with the rights and title therein of the said Henry Jukes."

Hordern subsequently conveyed the premises to William Tasker, who conveyed to Sidney Harris, who died, leaving a last will and testament, which was duly admitted to probate, whereby he appointed Edward A. Harris executor with full power of sale. Harris, as executor, sold to John R. Kenneday, but he refused to complete the purchase by reason of the recitals in the Hordern deed, to which we have already called attention. Thereupon and on the 12th day of June, 1869, an action was brought to compel him to accept title. An answer was interposed and a reference was had to Oscar H. Stearns to take proof of the facts and circumstances at issue in the case and to report the same with proofs and testimony taken before him to the court. He thereupon made his report, and afterwards and on the 16th day of June, 1869, judgment was entered in which it was adjudged and decreed that the objections of the defendant to the title to the lands be overruled, it appearing that the recitals in the deeds set forth in the answer are mis-recitals and are not true; that no deeds were ever given to John Langston, Jubal Shaw and Samuel Bailey by Job Gothard and Henry Jukes, or either of them; that executory contracts made with said persons were canceled and surrendered to James Hordern, the grantee of said Jukes and Gothard. It was further ordered and adjudged that John R. Kenneday specifically perform his contracts. Thereupon Kenneday took title and conveyed the same to the plaintiff.

It first becomes important to consider the effect of the judgment entered in the action of *Harris v. Kenneday*. As we have seen only four days elapsed between the service of the summons and the entry of final judgment. The only evidence reported by the referee was the affidavits of Henry Jukes, Job Gothard and James Hordern. It does not appear that any oral examination was had. Jukes in his affidavit says that

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he had some recollection of making a contract with John Langston, Jubal Shaw and Samuel Bailey in relation to the sale of lots ; that he supposes he received some money on the contracts, but does not know how much ; that he believes, or at least has no recollection that any deeds were executed, or if ever executed were not passed by deponent to Langston, Shaw or Bailey. Gothard says that he remembered making contracts with John Langston, Jubal Shaw and Samuel Bailey for the sale of land bought by him of Delmonico ; that he received, he thinks, a small amount of money from each of the parties on the contract ; that he thinks no deeds were executed by him under his contracts and he received no mortgages ; if he had he would have put them on record ; that he sold his interest in the property subject to the contracts to James Hordern. Hordern swore that he bought the property subject to certain contracts made with John Langston, Jubal Shaw and Samuel Bailey for deeds to be executed and mortgages to be received, but that they failed to comply with the contracts, and no deeds or mortgages were ever made or executed, and all of the contracts were surrendered to him to be canceled, and were delivered over to Tasker, his grantee ; that Langston built a house on the premises, which he allowed him to take off and remove as a consideration for his surrender and cancelment of his agreement ; that he is sure no deeds or mortgages were ever on the lots or any part of the same in pursuance of the contracts. This was all of the evidence given upon which that judgment was entered.

It will be observed that Jukes and Gothard have no distinct recollection in reference to the execution of deeds to Langston, Shaw and Bailey. They think they executed none, or if they did that they were not delivered, and they think that no mortgages were received back. It is not pretended that Hordern was in a position to have personal knowledge as to whether they did or did not execute and deliver such deeds. Langston, Shaw and Bailey were not parties to that action. They consequently were not bound by the adjudication there made. Neither is the same binding upon the defendant in

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this action. We must, therefore, regard the question here presented the same as if the adjudication in the Harris action had not been made.

The lands in question are vacant, having never been occupied. The plaintiff's title is such only as Hordern obtained through his deeds from Jukes and Gothard. Those deeds do not purport to convey the absolute fee to Hordern, but specifically reserve that conveyed to Langston, Shaw and Bailey, and provides that Hordern "shall stand in every respect and particular regarding the aforesaid property in the place and stead and with the rights and title therein" of Jukes and Gothard.

It is claimed that an examination of the register's office in the county of Kings fails to disclose any record of the deeds to Langston, Shaw and Bailey; that the recitals in the deeds only amount to constructive notice and cast upon the purchaser the duty of ascertaining from the records the extent and nature of their conveyances and that inasmuch as the record disclosed nothing the purchaser took absolute title in fee.

The question thus presented is not free from difficulty, but we incline to the opinion that the rule thus invoked does not and should not extend to the case under consideration. As we have seen, the Hordern deed specifically reserves therefrom the lands conveyed to Langston, Shaw and Bailey, "reference to their several deeds being thereunto had will more fully appear." Hordern would not, therefore, under the deed, take any title to that which had previously been conveyed to these parties. True, those deeds do not appear to have been recorded. They, however, may be in existence, and may hereafter be produced for record, and if they should, we do not understand that there is anything in the provisions of the Recording Act that would prevent the grantees therein named from claiming the lands described in their deeds. Conveyances not recorded are void as against subsequent purchasers in good faith and for a valuable consideration for the same real estate or a portion thereof, but if the purchaser has notice of such unrecorded deed he cannot claim the benefits of the act. Here the recitals

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in the Hordern deeds give notice of the existence of such unrecorded deeds.

In the case of *Sanders v. Townshend* (89 N. Y. 623), the action was ejectment and not for specific performance of a contract to purchase. Townshend held a deed which conveyed certain lots, specifically describing them. It also conveyed all other lands contained within the limits of the Harlem commons, as described on the map of Charles Clinton, "not heretofore conveyed by the parties of the first part." The party of the first part therein referred to formerly owned the entire tract known as the Harlem commons and had conveyed therefrom various lots of land. An examination of the records failed to disclose any previous conveyance of the lots in controversy. It was, therefore, held that Townshend had a paper title good on its face against the grantor, and good as against the world, except some person who could show an earlier conveyance from Townshend's grantor.

This case does not sustain the appellant's position, for it distinctly recognizes the rights of those holding prior grants.

The case of *Dow v. Whitney* (147 Mass. 1), also relied upon by the appellant, does not appear to be in point. In that case the deed contained a specific description of the granted premises, and then concluded by stating that they were the same premises that were conveyed to the grantor by a certain deed which conveyed a larger tract, and then recited that the conveyance was of all the land conveyed by the deed except such portions thereof as the grantor had theretofore sold. It was held that the recital did not operate to alter the description or limit the prior granting clause of the deed, but was a reference merely to the grantor's chain of title.

The defendant is entitled to a marketable title free from reasonable doubt. The records of the register's office do not show such a title. Its validity depends upon the determination of the fact as to whether deeds were in fact given to Langston, Shaw and Bailey, and the rule is that specific performance will not be decreed when the title depends upon a disputed question of fact outside of the record about which there is reason-

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able doubt, when the parties interested in such determination are not before the court. (*Fleming v. Burnham*, 100 N. Y. 1; *Kilpatrick v. Barron*, 36 N. Y. S. R. 15-20.)

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

ALFRED DE CORDOVA, Respondent, v. STEPHEN C. BARNUM,
Appellant.

A stock broker who holds collateral security for the stock transactions of a customer is not required, in the absence of a special agreement, to realize upon the collaterals, or to return the same to his customer before bringing an action to recover a balance found due him on closing up the transactions.

In such an action it appeared that plaintiff sold out the stock purchased and carried for defendant, pursuant to his order. Defendant offered to prove that it was the custom of stock brokers, where collateral was put up as a margin, and the account became sufficiently reduced to jeopardize it, to advertise and sell the collateral and charge his customer with the balance, and that this custom was known to plaintiff at the time the margin was put up and the account closed. This was excluded on objection. *Held*, no error; that whatever the custom of brokers might be while a speculation was pending, it had no application to a broker's right to recover what is due him after he has carried his customer's stock as long as requested, and finally sold pursuant to an express order.

(Argued January 20, 1892; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 14, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Wm. Romer and *Stephen S. Marshall* for appellant. The court below erred in holding that the relations between the

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parties were simply that of pledgor and pledgee. (Laws of 1882, chap. 402.) The court below erred in not allowing proof of usage which did not contravene any existing law. (*Sims v. U. S. T. Co.*, 35 Hun, 539; *Simmons v. Law*, 3 Keyes, 217; *Collender v. Dinsmore*, 55 N. Y. 208; *Barnard v. Kellogg*, 10 Wall. 383, 391; *Bradley v. Wheeler*, 44 N. Y. 495; *Wallis v. Bailey*, 49 id. 464; *Wheeler v. Newbold*, 16 id. 392.)

Everett P. Wheeler for respondent. The defendant having moved for a nonsuit, having given no evidence varying the plaintiff's case, and having made no request that the case should be submitted to the jury, cannot now complain that it was not so submitted. (*Stratford v. Jones*, 97 N. Y. 586, 589; *Dillon v. Cockroft*, 90 id. 649; *Ormes v. Dauchy*, 82 id. 443; *Koehler v. Adler*, 78 id. 287; *Trustees, etc., v. Kirk*, 68 id. 459; *Leggett v. Hyde*, 58 id. 272, 275; *O'Neill v. James*, 43 id. 84; *Winchell v. Hicks*, 18 id. 558; *Barnes v. Perine*, 12 id. 18; *Hagaman v. Barr*, 9 J. & S. 423.) Even if the defendant's conduct had not estopped him from complaining that the questions of fact were not submitted to the jury, yet there being no conflict in the evidence, a finding in favor of the defendant would have been entirely unwarranted. (*People v. Cook*, 8 N. Y. 67; *Nichols v. Goldsmith*, 7 Wend. 160; *Wombough v. Cooper*, 2 Hun, 428; *Appleby v. A. F. Ins. Co.*, 54 N. Y. 253.) The defendant's exceptions to the admission of evidence were well taken. (*McGoldrick v. Traphagen*, 88 N. Y. 334.) The court properly denied the motion to dismiss the complaint. (*Markham v. Jaudon*, 41 N. Y. 235; *Stenton v. Jerome*, 54 id. 480; *Baker v. Drake*, 66 id. 518; *S. S. Co. v. Duncomb*, 2 Stark, 919; *Lawton v. Newland*, 2 Stark. 72; *Eames v. Widdowson*, 4 C. & P. 151; Jones on Pledges, §§ 590, 592.) The defendant's exceptions to the exclusion of evidence offered by him were without foundation. (*Wheeler v. Newbould*, 16 N. Y. 392; *Markham v. Jaudon*, 41 id. 235; *Lawrence v. Maxwell*, 53 id. 19.) The exception to the refusal to charge the various propositions contained in the

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so-called findings of fact, is unavailing. (*Smedis v. B., etc., R. Co.*, 89 N. Y. 13; *Harris v. Tumbidge*, 83 id. 92.)

LANDON, J. The plaintiff was a stock broker, and brought this action to recover of the defendant a balance of account representing the losses upon the purchase and sale of certain stocks made by the plaintiff at the request of the defendant and upon a margin.

The transactions and the amount due the plaintiff upon them were established by the evidence, and the judgment should be affirmed, unless errors to the prejudice of the defendant were committed upon the trial.

It appeared from the evidence that during the pendency of the stock transactions in question, the defendant assigned to and deposited with the plaintiff fourteen shares of the Arms Horse Palace Car Company's stock to protect plaintiff from loss on the stock transactions. The defendant's speculations were unfortunate, and he finally gave plaintiff an order to sell out at the best he could get, and plaintiff did so. The plaintiff still holds the Horse Palace Car stock.

The defendant asked the court to hold, or to instruct the jury, that the plaintiff could not maintain this action without showing that he had used all reasonable means to realize upon the fourteen shares of stock which he held as collateral; that it was plaintiff's duty to advertise and sell it, and credit defendant with the proceeds, or to return it to defendant before this action was brought. The court refused to hold as requested. The defendant offered to prove the value of the fourteen shares of stock; the plaintiff's objection to such proof was sustained.

In these rulings no error was committed. The plaintiff held the fourteen shares of Horse Palace Car stock as collateral security to protect him from loss. There was no special agreement that the plaintiff should first realize upon the collateral before bringing an action against the defendant to recover the debt due him, and, therefore, the plaintiff was not required to realize upon the collateral before resorting to this action.

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(*Butterworth v. Kennedy*, 5 Bosw. 143; *South Sea Co. v. Duncomb*, 2 Strange, 919; *Lawton v. Newland*, 2 Starkie, 64; *Eames v. Widdowson*, 4 Car. & P. 151; *Elder v. Rouse*, 15 Wend. 218; *Colebrook on Collateral Securities*, 136; *Jones on Pledges*, § 590.)

The defendant offered to prove by a witness that it was the custom of stock brokers, when collateral security was put up as a margin and the account became reduced sufficiently to jeopardize it, to advertize and sell the collateral security and to charge his customer with the balance, and that such was the usage of the plaintiff known to the defendant at the time the margin was put up, and at the time of closing the account.

The court was justified in sustaining the objection to this offer, because the plaintiff sold out defendant's stocks upon defendant's express order, and not to protect himself because of a shrinking or exhausted margin. Whatever the custom of brokers may be while the speculation is pending, it can have no application to the broker's right to recover what is due him after he has carried his customer's stocks as long as requested, and finally sold them pursuant to his express order.

The other exceptions do not require discussion.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

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DELECTA H. WOODRUFF et al., Appellants, v. SOPHRONIA M. PADDOCK, Respondent.

Where the owner of land, subject to an easement, claims to own it free from the easement, and excludes for twenty years the owner thereof, who acquiesces in the exclusion, the easement is lost by adverse possession.

So also an abutting owner's private rights in a street may be lost in case their existence is denied and they are exclusively possessed for more than twenty years by one claiming the fee of the street.

In 1826 B., the owner of certain land in the city of R., laid it out into lots, and a map thereof was recorded; he sold and conveyed a lot, which in the deed was described by number, as designated on the map, which was

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referred to; this showed the lot as bounded on one side by an alley. The alley was used by the public until 1846, when such use was abandoned. C. became the owner of said lot in 1856; he was at the time the owner of the lot on the opposite side of the alley, and had since 1850 kept the same closed, had planted trees and erected a coal-shed thereon; he continued in the actual, exclusive and notorious possession thereof, claiming to own it until his death in 1888. In 1860 C. conveyed the lot first mentioned by the description contained in the original deed. Plaintiffs became the owners thereof in 1884. Defendant, in 1888, became the owner of part of the other lot, the description in his deed including the alley; he entered into possession and began the erection of a building thereon. In an action to restrain defendant from excluding plaintiff from using as a way the strip of land, formerly the alley, *held*, that while the grantee of B. of plaintiffs' lot acquired a right of way in the alley, the easement had been lost by the non-user of plaintiffs' predecessors, and by the adverse possession of C. and his successors.

Reported below, 56 Hun, 288.

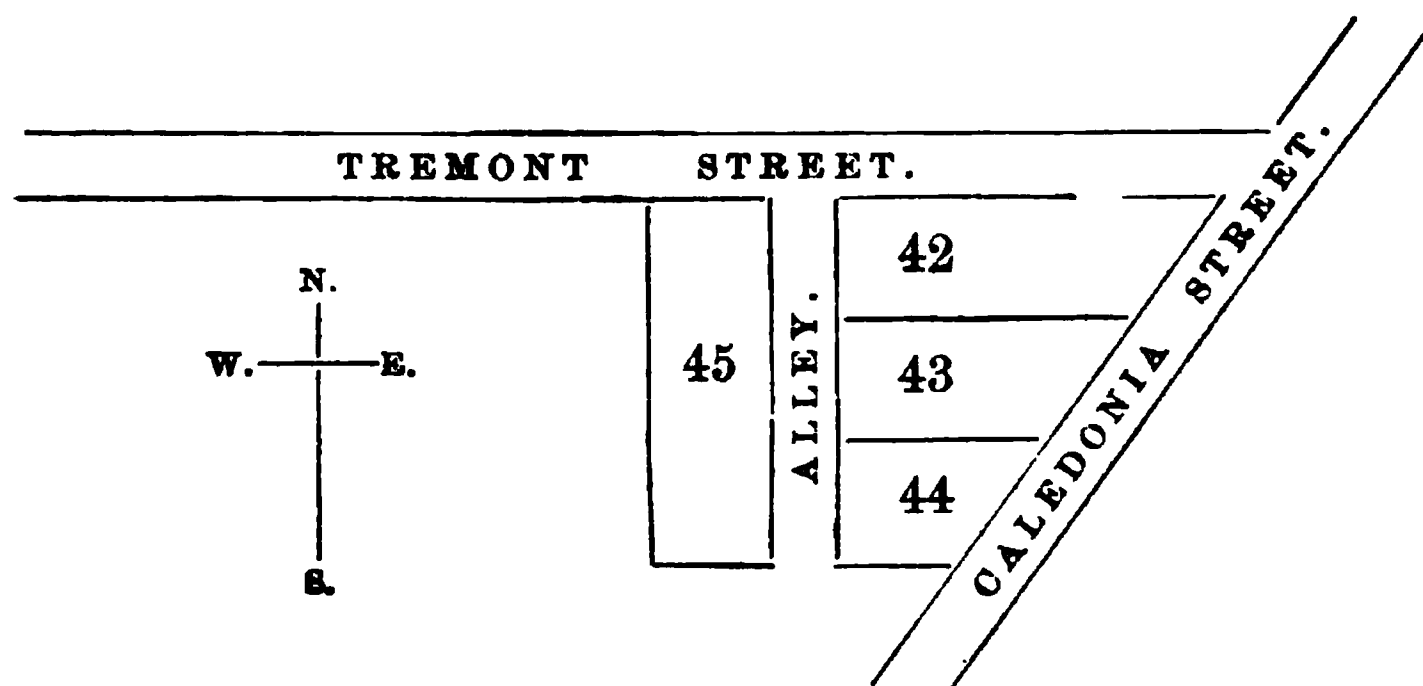
(Argued January 21, 1892; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 11, 1890, which affirmed a judgment in favor of defendant entered upon the report of a referee.

This action was begun May 2, 1889, to recover a judgment to perpetually restrain the defendant from excluding the plaintiffs from using as a way a strip of land one rod in width, extending along the east side of their premises (lot 45), and damages for having prevented them from having so used the strip before the action was begun. Their alleged cause of action was based on two grounds: (1) That the plaintiffs are the owners in fee of one-half of said alley, subject to the right of way of the abutting owners and the public; (2) That the strip of land was laid out by its former owner, and of the adjoining lots contiguous thereto, for an alley for the use of the grantees of the abutting lots.

In 1826, Josiah Bissell, Jr., owned land now within the city of Rochester, which he sub-divided into lots and designated them by numbers. The relation of these lots to each other, to the streets and to the alley in dispute, is shown by this diagram:

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A map of the land so sub-divided was recorded in 1826 in the office of the clerk of Monroe county. August 27, 1830, Bissell conveyed to Peter Lynch lot 45 by a deed in which it was described as No. 45 as designated on the map so recorded. A reference to the diagram shows that this lot was bounded on the north by Tremont street. Through mesne conveyances, simply describing the lot by its number, and referring to the map, John Conolly, became April 7, 1856, its owner in fee. February 1, 1860, John Conolly conveyed it to Cornelius C. Dickson, by the description contained in the previous deeds. March 15, 1884, the plaintiffs became the owners of this lot by mesne conveyances in which it was described as in the preceding deeds.

May 1, 1827, Josiah Bissell conveyed to Bartholemew Travers lot No. 42, designating it by its number and referring to the map. December 9, 1839, Travers conveyed it to Patrick Quigley, describing it by its number and referring to the recorded map, and also bounding it on the west by the east line of the alley. October 13, 1845, Quigley conveyed No. 42 to John Conolly, describing it by its number, by reference to the map, and also describing the west line as follows: "On the west by the line of the alley, being the same premises conveyed to said Patrick Quigley by Bartholemew Travers."

In 1888 Conolly died seized of lot 42 and left a will, which was duly probated November 2, 1888, by which he devised all of his real estate to Henry Anstice. November 10, 1888,

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Henry Anstice conveyed to the defendant the west half of No. 42 by a deed designating the lot by its number, referring to the map, and also describing it as beginning, "fifty feet west of the north-east corner of the lot of land conveyed to John Conolly by Patrick Quigley * * *. Thence southerly parallel with the west line of said lot No. 42 to the south line of said lot No. 42; thence westerly along the south line of said lot No. 42 and the same produced to the east line of lot No. 45 of said tract as laid down on said map, thence northerly along said east line of said lot No. 45 to the said south line of Tremont street, thence easterly along the south line of said Tremont street to the place of beginning, being the west part of said lot No. 42, and so much of the alley west of and adjoining the lot 42 as laid down on said map as is included between the north and south lines of said lot 42 produced westward to the east line of said lot 45, with appurtenances, etc."

Under this deed the defendant entered into possession of the land therein described and began the erection of a building on the disputed strip.

Further facts are stated in the opinion.

Edward F. Wellington for appellants. Title to land forming part of a public highway cannot be obtained by adverse possession, however long continued. (*Gerring v. Barfield*, 16 C. B. [N. S.] 597, 604; *Burbank v. Fay*, 65 N. Y. 57, 70; *Walker v. Caywood*, 31 id. 51, 64; *S. V. O. Asylum v. City of Troy*, 76 id. 114; *Turner v. R. H. Board*, L. R. [9 Eq.] 418.) Abandonment of a public highway cannot be predicated upon its unlawful appropriation by an individual. Neither can it be accomplished by the omission or neglect of the public to use it, except in such cases as fall within chapter 311 of the Laws of 1861. (*Driggs v. Phillips*, 103 N. Y. 83.) Chapter 311 of the Laws of 1881 has no application to this case. (2 R. S. [5th ed.] 405, § 113; *Marble v. Whitney*, 28 N. Y. 305; *McMannis v. Butler*, 51 Barb. 448; *Ludlow v. City of Oswego*, 25 Hun, 260; *Beckwith v. Whalen*, 65 N. Y. 331; *Lyon v. Munson*, 2 Cow. 426; *Vanderbeck*:

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v. *City of Rochester*, 49 Hun, 92; Laws of 1861, chap. 143, § 156; *Amsbry v. Hinds*, 48 N. Y. 59.) The action of the board of public works in 1874 was an assertion of the public rights to the alley within fifteen years after it was first obstructed, and constituted an unauthorized license to those in occupation, in no respect different from that given to the St. Vincent Orphan Asylum by the city of Troy. (76 N. Y. 112.) The public right has not been divested by a discontinuance of the highway. That could only have been accomplished by following the formal statutory regulations. (Laws of 1856, chap. 137; Laws of 1872, chap. 771.) The defendant is estopped by all the deeds down to Conolly and by his deed to Mrs. Dickson, which recognizes and asserts the alley. (*Bridges v. Wyckoff*, 67 N. Y. 122, 123; *Driggs v. Phillips*, 103 id. 83; *Cook v. Harris*, 61 id. 448; *In re Ladue*, 118 id. 213; *Flack v. Vil. of Green Island*, 122 id. 107.) The plaintiffs, as individuals, can maintain this action to enforce the public right. It is an incident to the situation in respect to the highway in question. (*Callinan v. Gilman*, 107 N. Y. 360.)

F. E. Drake for respondent. The testimony of David Cory to conversation with John Conolly was properly excluded upon the objection taken upon the hearing. (Code Civ. Pro. § 829.) The plaintiffs acquired no title to, interest in or right over the disputed premises by their deed of lot 45. (*French v. Carhart*, 1 N. Y. 96; *Mott v. Mott*, 68 id. 246; *Lampman v. Micks*, 21 id. 505; *Voorhis v. Burchard*, 55 id. 104; *Simmons v. Cloonan*, 81 id. 557; *Phelps v. McDonald*, 16 id. 82.) If, however, the conveyance from Conolly to Dickson shall be construed to carry title to the center line of the alley strip and pass, as appurtenant to lot 45, a right of way over the alleged alley, then such title to the disputed premises, and such right of way thereover, have been extinguished by the adverse possession of Conolly. (*Doolittle v. Tice*, 41 Barb. 181; *Hammond v. Zehner*, 21 N. Y. 118; *Barnes v. Light*, 116 id. 34; *Coming v. Gould*, 16 Wend. 531; *Smiles v.*

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Hastings, 22 N. Y. 217; *Snell v. Levit*, 110 id. 595.) If the alleged alley ever was a public highway, it ceased to be so before the commencement of this action. (Laws of 1861, chap. 311, §§ 1, 99; *Amsbry v. Hines*, 48 N. Y. 57; *Horey v. Village of Haverstraw*, 124 id. 273; 46 Barb. 622; *Ludlow v. City of Oswego*, 25 Hun, 260; *Vandemark v. Porter*, 40 id. 297; *Vanderbeck v. City of Rochester*, 46 Hun, 91; 92 N. Y. 629; Laws of 1834, chap. 199, §§ 12, 19; *City of Peoria v. Johnson*, 56 Ill. 45; *Winnetka v. Prouty*, 107 id. 218; *J. M. & I. R. R. Co. v. O'Connor*, 37 Ind. 95; *Fox v. Hart*, 10 Ohio, 414; *City of Hartford v. N. Y. & N. E. R. R. Co.*, 50 Conn. 250; 100 N. Y. 642; *Driggs v. Phillips*, 103 id. 77; 124 id. 273; *Lyon v. Munson*, 2 Cow. 426.) Even though the public right of way over the alley in question was not extinguished at the time of the commencement of this action, still the plaintiffs could not recover in this action on the ground that defendant's building was a public nuisance resulting in special damage to plaintiffs. (*Stevens v. Mayor, etc.*, 84 N. Y. 296; *Wright v. Delafield*, 25 id. 266; *Day v. Town of New Lots*, 107 id. 149-154, 155; *Dickenson v. Mayor, etc.*, 92 id. 584-588; Code Civ. Pro. § 723; *Reeder v. Sayre*, 70 N. Y. 180; *Davis v. N. Y. C. R. R. Co.*, 110 id. 646; *Harris v. Tumbridge*, 82 id. 92.)

FOLLETT, Ch. J. The referee found that from 1826 to 1846, the alley was used by the public, and by such use became a public way, but that its use had been abandoned by the public for more than forty years before this action was begun. He also found that between 1846 and 1850, a fence stood on the boundary line between lot 45 and the alley, and that between these dates John Conolly kept the alley closed by a gate at the Tremont street end, planted trees, erected a coal-shed thereon, and that from 1850 to the date of his death in 1888, he was in the actual, exclusive and notorious possession of the land, claiming to own it.

The widow of a former owner of lots 43 and 44, who was sworn on behalf of the plaintiffs, testified, and she was not

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contradicted, that about fifty years before the trial of this action, her husband bought those lots, moved on to them, and shortly after extended the fences across the alley, planted trees thereon, since which the alley had been shut up the most of the time, and before they left those lots, the alley had been all closed up for thirty years. For at least thirty-nine years before this action was begun, the alley, from end to end, had been enclosed by fences, occupied and cultivated by the owner of lots 42, 43 and 44.

None of the deeds in the plaintiffs' chain of title purport to convey any interest in the fee of this strip, and the referee also found that in 1860, when Conolly conveyed lot 45 to Mrs. Dickson, the former was in possession of the alley, claiming to own it; that she took her deed with knowledge of these facts, and that the grantor did not intend to convey nor the grantee to acquire any title or easement in the alley.

Neither the plaintiffs nor any of their grantors have acquired title to the *locus in quo*, nor to any part of it. (*Simmons v. Cloonan*, 81 N. Y. 557.)

Clearly the grantees of Bissell by the map and by the mode in which the lots abutting on the alley were conveyed, acquired rights of way in favor of their respective lots. And it is equally clear that the plaintiffs are now possessed of a right of way unless lost by the non-user of their predecessors and by the adverse possession of Conolly and his successors.

It is settled that under the Statute of Limitations of this state the legal title to land may be lost by its true owner, and be acquired by one holding it adversely for twenty years. (*Baker v. Oakwood*, 123 N. Y. 16.)

So an easement may be lost by adverse possession if the owner or possessor of the servient estate claims to own it free from the private right of another, and excludes the owner of the easement, who acquiesces in the exclusion for twenty years. (*Snell v. Levitt*, 110 N. Y. 595; Wash. Eas. [4th ed.] 718; *Yeakle v. Nace*, 2 Whart. 123.)

These rules are decisive of this action, unless the period within which the plaintiffs may maintain an action is, as is

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claimed in their behalf, enlarged by the fact that this alley was a public way from 1826 to 1846.

An abutting owner has two distinct kinds of rights in a highway or street. A public one, which he enjoys in common with all other citizens; and certain private rights, which arise from his ownership of property contiguous to the highway or street. These special rights increase the value of his abutting premises, are private property and, if they are destroyed or greatly injured without due process of law, damages may be recovered for the injury. But a person cannot maintain an action for an injury to public rights without showing that he has special or private rights which have been invaded. (*Abendroth v. Man. R. Co.*, 122 N. Y. 1-14; *Lansing v. Smith*, 8 Cowen, 146; *S. C.*, 4 Wendell, 10; Wood on Nuisances, 655.)

An abutting owner's private rights in a public street may be lost in case their existence is denied and they are exclusively possessed for more than twenty years by one who claims to own the fee of the street as against the world. It follows that in no aspect of the case are the plaintiffs entitled to recover.

Entertaining these views it is quite unnecessary to determine in what time a public street or highway ceases to be such as against the public by its non-user.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

JENNIE E. REILLY et al., Appellants, v. CHARLES HART,
Respondent.

An order was obtained for service by publication of the summons in a foreclosure suit upon the owner of the equity of redemption, who was a non-resident, but before the completion of the service the plaintiff died, and publication was thereafter continued to the termination of the six weeks directed by the order; afterwards the action was continued pursuant to the order of the court in the name of the executrix of the deceased plaintiff, without further publication or appearance on the part of said defendant. A judgment of foreclosure and sale was rendered

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and a sale made pursuant thereto. Upon a case submitted to determine as to whether plaintiff, who claimed title to the land under the foreclosure sale was entitled to the specific performance of a contract for the purchase thereof, *held*, that there was no effectual service of the summons in the foreclosure suit upon said defendant therein, and as to him the court acquired no jurisdiction, and as the equity of redemption was not barred by the sale, plaintiff was not able to convey a good title; that the effect of the death of the original plaintiff in the foreclosure suit was to suspend further proceedings other than for the continuance of the action, until his executrix was substituted; that while the order for service by publication may have remained available to give the court jurisdiction, the publication should have been commenced *de novo* after the substitution and continued for the requisite six weeks.

Reported below, 55 Hun, 465.

(Submitted January 22, 1892; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 10, 1890, in a controversy submitted for determination upon a case under section 1279 of the Code of Civil Procedure. The question submitted was as to plaintiff's right to the specific performance of a contract for the purchase by defendant of certain land, and the facts, so far as material, are stated in the opinion.

John R. Kuhn for appellants. The case shows that before the order was made for service of the summons upon these defendants by publication other defendants had been personally served, and the action was an "existing suit." (Code Pro. §§ 121, 132, 139; *Smith v. Joyce*, 11 C. P. 357; *Potter v. Van Vranken*, 36 N. Y. 619.) The provision that an action shall not abate by reason of the death of a party, means that everything relating to the action shall go right along as if the death had not occurred. (Code Pro. § 121; *Reed v. Butler*, 11 Abb. Pr. 128; *Smith v. Joyce*, 11 C. P. 357; *Moore v. Hamilton*, 44 N. Y. 672.) Plaintiff's title is not affected by the alleged defects. Defendant cannot justify his refusal to perform his agreement to purchase by a captious objection. (*Hellreigel v. Manning*, 97 N. Y. 56.)

Opinion of the Court, per BRADLEY, J.

Jesse Johnson for respondent. At common law, on the death of the party an action ceased. (*Green v. Watkins*, 6 Wheat. 260; *Torrey v. Robertson*, 24 Miss. 192; *McKee v. Straus*, 2 Binn. 1; *Farmer v. Frey*, 4 McCord, 150; *Macker v. Thomas*, 7 Wheat. 530.) Action having been brought in 1874 it is obvious that the Code of Procedure contains whatever of statutory rule there is applicable to this case. (Code Pro. § 121; *Shaw v. N. R. R. Co.*, 5 Gray, 162; *Jarvis v. Felch*, 14 Abb. Pr. 46.)

BRADLEY, J. The controversy arose upon the refusal of the defendant to complete the purchase of certain land in the city of Brooklyn, which land was the subject of a contract between the parties, whereby the plaintiffs agreed to sell and convey it by full covenant warranty deed to the defendant, and the latter to purchase it at the price of \$3,360. The refusal was upon the asserted ground that the plaintiffs were unable to convey a perfect title to the premises. The title of the plaintiffs was derived from the purchaser of the property on a sale made pursuant to a judgment of foreclosure of a mortgage. And the objection was founded on the charge that such foreclosure sale was ineffectual to bar the equity of redemption of one Lynch, who had the title subject to the mortgage. Lynch and his wife resided in the state of Louisiana. The action to foreclose the mortgage was commenced by one Coggshall in November, 1874, by the service of the summons personally upon two defendants other than Lynch and his wife. And in December following an order for service of the summons by publication upon them was obtained, and the summons was published accordingly, but before that service was completed the plaintiff in the action died. The publication of the summons, nevertheless, proceeded to the termination of the six weeks, the time directed by the order. And afterwards, pursuant to the order of the court in which that action was brought, it was continued in the name of the executrix of the will of the deceased plaintiff. The defendants Lynch did not appear; and the decree was thereafter entered and the sale

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pursuant to it had. The question is whether the summons was effectually served upon defendants Lynch. The action having been commenced by the personal service of the summons on the two other defendants, was properly continued in the name of the executrix as plaintiff. (Code, § 121; *Livermore v. Bainbridge*, 49 N. Y. 125.)

As the requisite time to effect service by publication had not expired at the time of the death of the original plaintiff, the summons had not then been served upon the defendants Lynch, and the court had acquired no jurisdiction of them, although it had of the action by the personal service of the other defendants. But the effect of the death of the plaintiff was to produce a suspension of further proceedings until his successor was placed in that relation to the action. What had been accomplished in it while there was a plaintiff, remained effectual, and when the executrix became such, progress in the action could properly be made from the place in the proceedings where the suspension had left them. (*Moore v. Hamilton*, 44 N. Y. 666.)

In that view, the order for service of the summons by publication may have remained available, but it is not seen how the four weeks publication of the summons before the death, and the two weeks following, could be treated as an effectual service upon those non-resident defendants. During the latter period there was no plaintiff, and in practical effect no action to support any proceedings within that time. The prior publication of the summons was then an unaccomplished attempt to serve it. And to constitute a service in that manner, it was necessary to publish once in each of six successive weeks in the two designated newspapers. There was, then, no service of the summons on those defendants while the action in which the order was made had any party plaintiff, and for that reason it was in a suspended condition and could not support any proceeding then taken for any purpose other than to continue it in the name of the successor as such. Before the death of the original plaintiff the court had acquired no jurisdiction of those defendants. It could not obtain any during the suspen-

Opinion of the Court, per BRADLEY, J.

sion following his death, and consequently it had no jurisdiction of them at the time the executrix became plaintiff; and it does not appear that their persons were thereafter in any manner brought in that relation to the court. It is suggested that the situation is no different than it would be in case of an assignment by a plaintiff during the pendency of an action, but it may be seen that in such case there would continuously be a plaintiff, and for that reason not necessarily any legal suspension of proceedings. As the statutory provisions relating to the continuance of the action at the time in question were in the old Code, no reference to those of the present Code is called for; but the latter, in the respect under consideration, do not modify the rule applicable to the present case.

These views lead to the conclusion that the defendant was justified in his refusal to accept, under the contract, the title which the plaintiffs were able to convey, and that the judgment should be affirmed.

All concur.

Judgment affirmed.

MEMORANDA

OF

*CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.*

CAROLINE K. BRENNAN, Respondent, *v.* THE CITY OF BUFFALO,
Appellant.

(Argued October 6, 1891; decided October 20, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made March 25, 1889, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

W. F. Worthington for appellant.

Spencer Clinton for respondent.

Agree to affirm ; no opinion.

All concur, except VANN and HAIGHT, JJ., not voting.

Judgment affirmed.

FLORENCE CAMPBELL, Appellant, *v.* THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Respondent.

(Argued October 6, 1891; decided October 20, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 7, 1889, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Circuit.

N. A. Calkins for appellant.

Hamilton Harris for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

SHERWOOD STERLING, Respondent, v. THE METROPOLITAN
LIFE INSURANCE COMPANY, Appellant.

(Argued October 6, 1891; decided October 20, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made June 25, 1888, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

William H. Arnoux for appellant.

L. A. Fuller for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

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JOSEPH DeVau, Respondent, v. THE PENNSYLVANIA AND
NEW YORK CANAL AND RAILROAD COMPANY, Appellant.

Plaintiff, an employe of defendant, was struck by a dirt-plow which fell from a car, one of a train from which dirt and gravel was being removed by its use. Under the charge of the court, the jury were permitted to find from the fact that the accident occurred, without any evidence of negligent or unskillful construction of the plow, or of a failure to keep it in repair, that the falling of the plow was owing to the fault of defendant. *Held*, error.

(Argued October 7, 1891; decided October 20, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made November 19, 1889, which overruled defendant's exceptions ordered to be heard in the first instance at the General Term, and recorded judgment in favor of plaintiff upon a verdict.

This action was brought to recover damages for injuries claimed to have been sustained by plaintiff, an employe of defendant, by reason of its negligence.

The following is the opinion in full:

"Whether at the close of the testimony a question was presented which the plaintiff was entitled to have submitted to

the jury need not be considered, because error in the charge, as made, requires a reversal of the judgment.

“The plaintiff, while in the employ of the defendant, and on the 22d day of October, 1887, was struck by a dirt plow as it fell off one of the cars from which earth and gravel were being removed by its use, resulting in very severe injuries.

“It appears that the defendant was filling a trestle between Clinton and Seneca streets, in the city of Buffalo, with material brought from Cheektowaga, a few miles away. The cars were loaded with a steam shovel, and men were employed to remove from the material placed on the cars all large stones, for greater safety in unloading. The cars were then run to the trestle and unloaded with an iron machine called a plow. It was about twenty-four feet long and rested upon four wheels. A mould-board, jointed and flanged, from three to three and one-half feet high, made of boiler iron, was bolted to the beam of the plow. This beam was about twelve inches wide and eight inches thick, and ran its entire length; iron braces ran across, and it was bridged with boiler iron. At the bottom was an iron shoe, covered with a steel plate. This plow was located on the last car of the train, and when the trestle was reached, six of the cars in the latter portion of the train were separated from the rest of the train and tied to the trestle. On one side of the cars and extending the whole length, was bolted a piece of timber about eight inches square, called a guard-rail, and after the cars had been fastened to the trestle the engine was hitched to the plow by a cable, and the plow, which weighed from two to three tons, and in addition had piled upon it from four to five tons of railroad iron, was drawn along over the car, one side running next to the guard-rail of the car, and the other, or mould-board side, crowding the dirt off the car. If any obstructions should cause the plow to be raised above the guard-rail, the pressure of the earth on the mould-board side would necessarily force the plow off the car onto the ground.

“On the day of the accident the plow had been drawn over one car, and was either entering upon or was partially on the second car, when it was suddenly raised up over the guard-rail and thrown to the ground.

“Plaintiff’s witnesses testified that the plow had fallen off on several occasions before this. It does not appear from the evidence that there was at the time any known appliance better adapted for the purpose for which it was used than this plow, nor did the evidence of the plaintiff point out any defect in the original construction or suggest that it was not in perfect repair, nor did it tend to furnish any reason for the plow’s jumping from the car.

“On the part of the defendant the evidence tended to show that it was occasioned by a large stone becoming wedged between the first and second cars, so as to cause the plow to be raised up above the guard-rail, the pressure of the earth then forcing it over the side of the car. Clearly, then, the evidence did not authorize the jury to find that the master, in the use which it attempted to make of this plow, failed to discharge its duty to the plaintiff, in that it omitted to provide suitable machinery and appliances with which to perform the work. But the court, nevertheless, instructed the jury: ‘Now, it is for you to determine, was this plow properly constructed, in your judgment? There is no proof in this case as to how other cars or other plows are constructed, or whether this is better or worse than other cars or other plows. You are somewhat in the dark, but you must determine it — was this plow and these appliances properly constructed — reasonably proper, and would they ordinarily perform the duties which they were designed to perform, without accident of any character? If it was not of such a construction, then you will pass on to the question of damages, and the plaintiff is entitled to recover.’ The jury were thus permitted to find from the fact that an accident occurred, without any evidence whatever of negligence or unskillful construction, or a failure to keep that which was originally properly constructed in repair, that the falling of the plow from the car was owing to the fault of the defendant. Indeed, the jury must have so found, for the charge of the court was silent as to any other ground on which to found a liability on the part of the defendant.

“As this portion of the charge was excepted to by the defendant, the judgment should be reversed.”

F. Brundage for appellant.

Charles A. Pooley, for respondent.

PARKER, J., reads for reversal.

All concur.

Judgment reversed. _____

JAMES G. KNAPP, Appellant, *v.* THE PREFERRED MUTUAL ACCIDENT ASSOCIATION, of New York, Respondent.

(Submitted October 8, 1891; decided October 20, 1891.)

APPEAL from order of the General Term of the Supreme Court, in the fifth judicial department, made June 22, 1889, which reversed a judgment in favor of plaintiff, entered upon a verdict and reversed an order denying a motion for a new trial.

Tabor & Brainard for appellant.

E. C. Aiken for respondent.

Agree to dismiss appeal on authority of *Williams v. D., L. & W. R. R. Co.* (127 N. Y. 643); no opinion.

All concur.

Appeal dismissed. _____

CONRAD STUBING, Respondent, *v.* JOHN STUBING et al.,
Impleaded, etc., Appellants.

(Argued October 9, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made October 28, 1889, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

Leopold Leo for appellants.

Fernando Solinger for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JOHN M. YOUNG, Respondent, v. THE METROPOLITAN ELE-
VATED RAILWAY COMPANY et al., Appellants.

(Argued October 9, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made November 12, 1889, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

Brainard Tolles for appellants.

Charles Gibson Bennett for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

WILLIAM B. RICE, Appellant, v. ATMORE L. BAGGOT,
Respondent.

(Submitted October 12, 1891 ; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made the first Monday of January, 1889, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

George S. Hastings for appellant.

Moses Goodman for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

CASPER DORT, Appellant, v. EVA NICKEN, Respondent.

(Submitted October 12, 1891 ; decided October 27, 1891.)

APPEAL from order of the General Term of the Supreme Court, in the fifth judicial department, made October 19, 1889, which reversed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

Myron H. Peck for appellant.

William C. Fitch for respondent.

Agree to reverse order and to affirm judgment of Special Term on opinion of DANIELS, J., at Special Term.

All concur.

Ordered accordingly.

THE MANHATTAN RAILWAY COMPANY, Appellant, v. JOHN M.
CORNELL, Respondent.

(Argued October 12, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, in favor of defendant, entered upon an order made November 7, 1889, which dismissed plaintiff's claim upon the merits on a case submitted under sections 1279-1281 of the Code of Civil Procedure.

Samuel H. Benton for appellant.

Tallmadge W. Foster for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ISAAC WOLF, by Guardian, etc., Appellant, *v.* THE HOUSTON,
WEST STREET AND PAVONIA FERRY RAILROAD COMPANY,
Respondent.

(Argued October 13, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 23, 1888, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Circuit.

Max Altmayer for appellant.

Charles E. Miller for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

SAMUEL E. MERWIN et al., Appellants, *v.* ANDREW JACKSON
ROGERS, Respondent.

(Submitted October 13, 1891; decided October 30, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made June 29, 1889, which affirmed a judgment of the General Term of the City Court of New York in favor of defendant, entered upon an order sustaining a demurrer to the complaint.

J. Homer Hildreth for appellants.

James C. De La Mare for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THOMAS OTIES, Respondent, *v.* THE COWLES ELECTRIC SMELTING AND ALUMINUM COMPANY, Appellant.

(Argued October 14, 1891; decided October 30, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

E. M. Ashley for appellant.

Wm. C. Greene for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

LEVI S. NOYES, Appellant, *v.* WILLIAM TURNBULL et al.,
Respondents.

(Argued October 14, 1891; decided October 30, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 21, 1889, which affirmed a judgment in favor of defendants entered upon a verdict directed by the court.

Edward F. Bullard for appellant.

Jesse Johnson for respondents.

Agree to affirm on opinion of LEARNED, J., in court below.

All concur.

Judgment affirmed.

ALFRED S. LASCELLES et al., Respondents, *v.* JOHN MILLER,
Appellant.

(Argued October 15, 1891; decided October 30, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 12, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

John A. Deady for appellant.

A. Gallup for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

DAVID H. LEWIS, Respondent, *v.* SEMON BACHE et al.,
Appellants.

DAVID H. LEWIS, Respondent, *v.* HENRY H. CAHN et al.,
Appellants.

(Argued October 16, 1891; decided October 30, 1891.)

APPEALS from judgments of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made December 2, 1889, which affirmed judgments in favor of plaintiff entered upon the report of a referee.

Alex. Blumenstiel for appellants.

Charles H. Griffin for respondent.

Agree to affirm ; no opinion.

All concur.

Judgments affirmed.

ANNIE F. DARRAGH, Respondent, *v.* REUBEN ROSS, Appellant.

(Argued October 9, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 10, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict.

James M. Hunt for appellant.

S. E. Fairfield for respondent.

Agree to affirm ; no opinion.

All concur, except BROWN, J., not sitting.

Judgment affirmed.

JOHN HOURNEY, Respondent, *v.* THE BROOKLYN CITY RAIL-ROAD COMPANY, Appellant.

(Argued October 12, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made November 25, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

Samuel D. Morris for appellant.

Isaac M. Kupper for respondent.

Agree to affirm ; no opinion.

All concur, except FOLLETT, Ch. J., and PARKER, J., dissenting.

Judgment affirmed.

180 642
161 444

MARGARET WELLS, Appellant, v. FRANCIS ALEXANDRE et al.,
Respondents.

Plaintiff proposed, in writing, to furnish defendants' steamers, which were making regular trips during the year between certain ports, with coal at a price named for the year 1888, the quantity not being specified; the proposal was accepted. Coal was delivered as needed until June 25th, when defendants sold and ceased to operate their steamers, and declined to receive coal thereafter. The purchaser continued to make regular trips with the steamers as before. In an action to recover damages for breach of the contract, *held*, that it was for the delivery of all the coal required for the operation of the steamers during the entire year and not a contract for successive deliveries of coal to be made only when the defendants should give plaintiff notice that a delivery was required; that the fact that defendants sold the steamers was immaterial, as this did not operate to relieve them from the obligation to take the coal required in the ordinary and accustomed use of the steamers; and so, that plaintiff was entitled to recover.

Wells v. Alexandre (24 J. & S. 542), reversed.

(Argued October 13, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 15, 1889, which reversed an interlocutory judgment of the Special Term sustaining a demurrer to one of the defenses set forth in the defendants' answer.

This action was brought to recover damages alleged to have been sustained by plaintiff from a breach of contract by defendants.

The following is the opinion in full:

"The complaint alleges a contract whereby defendants agreed to purchase from the plaintiff, at a specified price, all coal necessary for the use of certain steamships, of which defendants were the owners, during the year 1888.

"The case was determined upon the pleadings, the plaintiff having demurred to the second defense of the answer. This defense set forth the facts in relation to the alleged contract, and the question involving its construction is presented by the demurrer. It appears that on and prior to January fourth, the defendants were the owners and charterers of certain steamships, and were engaged in the business of operating a

steamship line between New York and certain ports in Cuba and Mexico, and that the steamers City of Alexandria, City of Washington and Manhattan formed a part of such line.

“December 31, 1887, the plaintiff addressed the following communication to the defendants:

‘Messrs. F. ALEXANDRE & SONS, New York:

‘GENTS.—We propose to furnish your steamers, City of Alexandria, City of Washington and Manhattan, with strictly free burning pea, delivered along side Pier 3, North River, for the year 1888, commencing Jan. 1st to Dec. 31st, for the sum of three dollars and five cents per ton. We also agree to furnish any other steamers of your line with same coal and at same price at any time you wish. If, through any cause, we are unable to deliver pea coal, we will deliver you other sizes at an equitable adjustment of price.

‘Yours, very respectfully,

‘JOS. K. WELLS, *Agt.*’

“To which the defendants on January 4, 1888, replied as follows:

‘Mr. Jos. K. WELLS:

‘DEAR SIR.—We beg to accept your offer of 31st ult., to furnish our steamers, City of Alexandria, City of Washington and Manhattan, with strictly free burning pea coal, delivered along side Pier 3, North River, for the year 1888, commencing January 1st, for the sum of \$3.05 per ton of 2,240 lbs.; also to furnish any other steamer of our line with same coal at same price, if we wish it. If, through any cause, you are unable to deliver pea coal, you will deliver us other sizes at an equitable adjustment of price.

‘Yours truly,

‘F. ALEXANDRE & SONS.’

“Thereafter, and until the twenty-fifth day of June following, the plaintiff furnished to the defendants such quantities of coal as were required for the use of the steamships named. On that day the defendants sold to the New York and Cuba Steamship Company, all their steamship property, charters and business, including the steamers mentioned in the correspondence, and ceased to operate them. The steamers under the

control and management of the purchaser of June twenty-fifth continued to make regular trips at stated intervals between the same ports as before, and during the remaining portion of the year required and used large quantities of coal. The plaintiff insists that the correspondence created a valid contract by which she became bound to deliver, and the defendants to receive, at the price named, all coal which would be required for the operation of the steamers during 1888, and as the coal required for their use was not received by the defendants after June twenty-fifth, that she is entitled to recover the damages sustained because of the default of the defendants.

“The defendants, on the other hand, contend that the correspondence did not create a contract; that if it did, it was a contract for successive deliveries of coal, to be made only when the defendants should give the plaintiff notice that a delivery was required, and as notice had not been given, the defendants are not in default.

“If in plaintiff's offer the words ‘one thousand tons’ had been employed instead of ‘your steamers City of Alexandria, City of Washington and Manhattan,’ it would not be questioned that the written acceptance of the defendants created a valid contract. The offer and acceptance were unqualified; the price fixed; the duration of the contract limited to a period commencing January first, and ending December thirty-first of the same year; and the quantity would have been certain.

“As it was not possible to determine the precise amount of coal that would be required to operate the steamers during the year, the plaintiff seems to have made his proposition as to amount as definite and certain as the situation permitted. Three of defendants' steamers made regular trips at stated intervals between certain ports and necessarily required and used in so doing large quantities of coal, and in view of that condition the plaintiff offered to ‘furnish your steamers City of Alexandria, City of Washington and Manhattan,’ with coal for a period of about a year. It is very clear that the language employed by plaintiff in the light of surrounding circumstances was intended to make as definite as possible, the quantity of coal which the defendants would be required to take. The quantity to be measured by the requirements of the three

steamers for the year ensuing in an employment about which they had been long engaged. So, while at the date of the agreement the quantity was indefinite, it was, nevertheless, determinable by its terms and, therefore, certain, within the maxim, *certum est quod certum reddi potest*.

“Defendants urged that if it be conceded that the proposition accepted was to furnish the steamers with coal for the year, at three dollars and five cents per ton, still the undertaking was to furnish coal from time to time when defendants should notify her that deliveries were required, and as no such notice has been given since the last delivery for which payment has been made, the defendants are not in default and no recovery can be had.

“The argument made in support of this proposition briefly stated is, that it is apparent that it could not have been in the contemplation of the parties that the coal should be furnished in one lot, but rather at different times as the steamers required it for their several voyages; nor could the plaintiff know the amount which each steamer would require at the successive loadings. Therefore, the defendants were to determine the time and quantity for each delivery, and as the contract contained no promise to give the plaintiff notice, the defendants were bound to take only such coal as they notified the plaintiff to furnish.

“It may be doubted whether there is anything in the record to warrant a determination that the plaintiff would not know the several amounts and times when coal would be needed, but if it were otherwise, we do not deem it controlling. As we have already said, the evident intention of the parties was that the plaintiff should furnish to the defendants all the coal which the steamers named should require in the work in which they were employed for the year ensuing, and that the parties should perform all needful acts to give effect to the agreement; therefore, if a notice was requisite to its proper execution, a covenant to give such notice will be inferred, for any other construction would make the contract unreasonable and place one of the parties entirely at the mercy of the other. (*Jugla v. Trouttet*, 120 N. Y. 21-28; *New Eng. Iron Co. v. Gilbert E. R. R. Co.*, 91 id. 153; *Booth v. C. R. M. Co.*, 74 id. 15.)

"The fact that the defendants deemed it best to sell the steamers, cannot be permitted to operate to relieve them from the obligation to take the coal which the ordinary and accustomed use of the steamers required, for the provisions of the agreement do not admit of a construction that it was to terminate in the event of a sale or other disposition of them by the defendants.

"The judgment should be reversed."

Geo. Bethune Adams for appellant.

Lewis Cass Ledyard for respondents.

PARKER, J., reads for reversal.

All concur, except HAIGHT, J., dissenting.

Judgment reversed.

130 646
136 474

JAMES R. WATTS, Appellant, v. SAMUEL B. ADLER, Respondent.

Where in an equity action the defendant does not plead want of equitable jurisdiction or allege that plaintiff has an adequate remedy at law, he may not insist upon the trial that an action in equity will not lie.

An action in equity for an accounting between copartners is an appropriate, if not an exclusive remedy to adjust and settle the partnership affairs.

Although upon dissolution of a firm one of the copartners is alone authorized to liquidate the firm business, he may maintain an action for an accounting and thereby compel a copartner to pay over any balance that may be established against him, or in case of deficiency in firm assets, to contribute his proportion of what is required to discharge the debts of the firm.

(Argued October 14, 1891 ; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1889, which affirmed a judgment entered on the decision of the court on trial at Special Term dismissing the complaint.

This was an action for an accounting between former copartners after a voluntary dissolution of the firm.

The articles of copartnership provided, among other things, that "for the purpose of carrying on the business of wholesale

coal dealers," the plaintiff and defendant should be copartners from January 13, 1885, until January 12, 1888, and that on or before May 1, 1885, each partner should contribute as capital the sum of \$10,000. The profits were to be shared and the losses borne in the proportion of sixty-three per cent by the plaintiff to thirty-seven per cent by the defendant. Upon the expiration or dissolution of the firm the plaintiff was to "have the exclusive right to the good will of the business and to liquidate" its affairs. The plaintiff paid in his share of the capital but the defendant did not pay in all of his and both parties drew out freely prior to the 2d of September, 1885, when the firm was dissolved by mutual consent. At this time the defendant was indebted to the firm to quite a large amount for coal purchased by him. There were uncollected accounts, exceeding twenty-five in number, and some unsettled liabilities, but the amount to be collected or paid did not appear. The firm had a lease of the premises it occupied and the term did not end until May 1, 1888. The rent reserved was at the rate of \$1,500 for the first year and \$1,750 for each remaining year, payable quarterly. The plaintiff, "as liquidator," took possession of the books and assets of the firm and paid bills, but did not discharge all the liabilities. He purchased coal to fill the orders taken before the dissolution and endeavored to dispose of the lease, as he testified, pursuant to an agreement between himself and the defendant, but was unable to do so because he had not the money required to comply with the terms proposed.

The following is the opinion in full:

"Upon the first trial of this action the complaint was dismissed upon the ground that it did not state facts sufficient to constitute a cause of action, in that it failed to show that the plaintiff had any right to equitable relief, but the judgment was reversed by the General Term, which held that when a copartnership has been dissolved and its accounts are unsettled, an action in equity for an accounting is proper to settle the rights of the parties. (*Watts v. Adler*, 13 N. Y. S. R. 553.) The defendant did not appeal from that decision, but, upon the second trial, which is now under review, renewed his motion to dismiss the complaint upon the same ground as

before, and now insists that the position thus taken is a complete answer to this appeal. The defendant did not plead a want of equitable jurisdiction in his answer, nor allege that the plaintiff had an adequate remedy at law, and hence was in no situation to insist upon the trial that an action in equity would not lie. (*Truscott v. King*, 6 N. Y. 147, 165; *Town of Mentz v. Cook*, 108 id. 504, 508; *Ostrander v. Weber*, 114 id. 95, 102; *Hyatt v. Ingalls*, 124 id. 93, 105.) Moreover, we see nothing in this case to take it out of the general rule that an action in equity for an accounting is the appropriate if not exclusive remedy to adjust and settle the affairs of a copartnership. (Story's Eq. Jur. [13th ed.] §§ 441, 466; 2 Bates on Partnership, § 921; 2 Lindley on Partnership [3d ed.], 1000.) As was said by Mr. Justice DANIELS, in his dissenting opinion below: 'The fact that the parties had largely settled their affairs prior to the commencement of the action, formed no objection to their completion and adjustment through its intervention.' Although the plaintiff was authorized to liquidate the business of the firm, still he could maintain an action for an accounting and thereby compel the defendant to pay over any balance that might be established against him. Each partner has a right to an accounting from his copartner as to all dealings and transactions connected with the business of the firm and, as the result may indicate, either to a ratable distribution of any surplus there may be after payment of the debts, or to a ratable contribution to make up the sum required to discharge the debts. Thus all the obligations, both express and implied, arising from the copartnership agreement, may be enforced in a convenient and effective manner, by a court having power to adapt its action to every variety of circumstances.

"Upon the last trial the court found as facts that when the firm was dissolved, a balance was struck and a settlement had between the parties of all their copartnership transactions; that pursuant thereto the defendant gave to the plaintiff his two promissory notes for \$1,000 each, and 'that the transactions between the parties was then and there stated and settled, and no fraud or mistake appears whereby the settlement thus made is or can be impeached.' This finding is the

foundation of the judgment dismissing the complaint, and the exception taken by the plaintiff thereto presents the question whether there was any evidence to support it under the rule of appeal to this court. Neither party alleged in his pleading or claimed on the trial that any final or general settlement had been made. The position of the plaintiff, as stated in the complaint, with reference to the giving of said notes, was 'that upon said dissolution, the defendant being then indebted to the said firm in the sum of \$4,694.58, with interest, for coal theretofore sold by it to him, and in other sums, and he alleging that he was not able to pay such indebtedness in cash, it was agreed between the plaintiff and defendant that an approximate calculation be made of the probable final result of the liquidation of the affairs of said firm, estimating in such calculation that the lease of the said offices could be so disposed of as to relieve the said firm from liability for rent thereunder after the 1st day of May, 1886, and that the assets of said firm were actually worth their full face value; that such calculation and estimate was made and the sum then determined upon * * * as the approximate sum that would be due by the defendant to the plaintiff in liquidating the affairs of the said firm on account of the aforesaid indebtedness of the defendant for coal, and upon the basis aforesaid, was the sum of \$2,000, for which the said defendant * * * made and delivered to the plaintiff his two certain promissory notes, each for the sum of \$1,000, * * * which, when paid, it was agreed should be applied toward the payment of said indebtedness for coal.' The defendant, by his answer, admitted the making of said notes, which were due and unpaid, but denied the remainder of said allegations. He specifically denied that said notes were given for any indebtedness of his, or that the proceeds thereof were to be applied on account thereof, and alleged that they 'were made by him and received by the plaintiff to be discounted for defendant's benefit, and the proceeds were to be paid over to him, defendant, which was not done.' It appeared that before the commencement of this action the defendant had sued the plaintiff for converting said notes, and each party, in his pleading in that action, made the same allegations, in substantially

the same words, as to the origin and object of the notes, as he subsequently made in this. There was no other material issue joined therein, and the trial resulted in a judgment on the merits in favor of the defendant in that action and the plaintiff in this. Thus it was so determined as to admit of no dispute by either party, that said notes were not given in settlement of all the unadjusted matters between the copartners, but were given by the defendant to be applied, when paid, upon his indebtedness to the firm, mainly on account of the coal that he had purchased of it. (*Lorillard v. Clyde*, 122 N. Y. 41.)

“Upon the trial of this action the plaintiff testified that after the dissolution a statement was made embracing the amount to the credit of defendant’s capital account, the amount to the debit of his coal account, and the condition of the profit account. A rough estimate was made of the liability under the lease, upon the theory that it could be disposed of by May 1, 1886, and of the clerks’ salaries until the close of the year 1885, and ‘it was determined that the amount of his indebtedness would not vary much from \$2,000, for which he gave’ said notes. The notes were not paid and the lease was not disposed of, because the plaintiff had no money to accept the offer that was made to cancel it for the sum of \$750. There was no other testimony as to a settlement. The defendant did not claim that there was a settlement, nor furnish any evidence on that subject. The case was apparently tried upon the theory, as indicated by the objections, ruling and the omission to take exceptions, that there would be an accounting as a matter of course. The main struggle was over the lease, the defendant claiming that the plaintiff could have disposed of it if he had wished to. We do not think that there was any evidence of ‘a settlement between the parties of all their copartnership transactions.’ The liability under the lease was not adjusted, and the only point considered was the indebtedness of the defendant to the firm. Considering the adjudication in the prior action between the parties, and the pleadings in both actions, in connection with the testimony of the plaintiff, which is all the evidence there is, either direct or indirect, upon the subject of a settlement, we think that it conclusively appeared that there was not such a settlement as would defeat an action

for an accounting. The finding of the trial court, being without any evidence tending to sustain it, was a ruling upon a question of law (Code Civ. Pro. § 993), and the exception taken thereto by the plaintiff compels us to reverse the judgment appealed from and order a new trial, with costs to abide the final award of costs."

Treadwell Cleveland for appellant.

Jacob F. Miller for respondent.

VANN, J., reads for reversal and new trial.

All concur.

Judgment reversed. _____

ROBERT J. HOWE, Respondent, *v.* JOSEPH J. MOREHOUSE
et al., Appellants.

(Submitted October 16, 1891 ; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 2, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict.

A. M. & G. Card for appellants.

Edward P. Wilder for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

JAMES P. KERNOCHAN, Individually and as Executor, et al.,
Respondents, *v.* THE NEW YORK ELEVATED RAILROAD COM-
PANY et al., Appellants.

1306 651
132 486

In an action by an abutting owner against an elevated railroad company operating its road in a city street, the opinion of a witness as to what would have been the value of the property if the road had not been built is incompetent.

Kernochan v. N. Y. E. R. Co. (25 J. & S. 434), reversed.

(Argued October 19, 1891 ; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 6, 1890, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought by an owner of premises abutting on a street in the city of New York through which defendant had constructed and maintained an elevated railroad, to restrain them from maintaining and operating the same, and to recover damages.

The only question discussed in the opinion was as to whether the opinion of witness was competent evidence as to what the value of plaintiff's premises would have been if the defendant's road had not been built. The court decided that the testimony was incompetent on authority of *Roberts v. N. Y. El. R. R. Co.* (128 N. Y. 455).

J. C. Thomson for appellants.

G. Willett Van Nest for respondents.

POTTER, J., reads for reversal and new trial.

All concur.

Judgment reversed. _____

VICTORIA A. JONES et al., Appellants, v. WILLIAM SLOCUM,
Respondent.

(Argued October 20, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 7, 1889, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

John C. Hulbert for appellants.

Matthew Hale for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

CHARLES H. SMITH, Respondent, v. JOSEPH RYAN, Appellant.

(Argued October 21, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made February 24, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

Horace Graves for appellant.

James D. Bell for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

JULIUS A. KOHN, Appellant, v. MALCOLM HENDERSON,
Respondent.

(Argued October 23, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 10, 1890, which affirmed a judgment in favor of plaintiff entered upon a judgment directed by the court.

Nathan Bijur for appellant.

Moore & Moore for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

COURTLAND L. HUNGERFORD, Respondent, v. HANNAH M.
BENT, Appellant.

(Argued October 26, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order

made October 1, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Edmund L. Pitts for appellant.

John J. Ryan for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

MARY DUFFY, Respondent, v. CATHARINE DUFFY, Appellant,
et al., Respondents.

(Argued October 27, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 23, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and denied a motion for a new trial.

Rufus M. Williams for appellant.

William Erwin for Susan Daly, respondent.

Sidney H. Stuart for Mary Duffy, respondent.

Doherty, Durnin & Hendricks for Francis Duffy et al., respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

MARY J. KENNEDY, Respondent, v. ROCHESTER CITY AND
BRIGHTON RAILROAD COMPANY, Appellant.

In an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, plaintiff may not support his own testimony, as to the effect of the injuries, by proof of declarations to the same effect made by him after the accident, and forming no part of the *res gestæ*, to persons other than a physician in attendance upon him professionally.

It seems, the rule was different, prior to the passage of the statute allowing parties to be witnesses.

It seems also, that evidence of involuntary exclamations, which are natural concomitants and manifestations of pain and suffering, are still admissible where they form part of the *res gestæ*.

But complaints made which are so far detached from the occurrence as to admit of deliberate design, and of their being the product of a calculating policy on the part of the complainant, cannot properly be regarded as part of the *res gestæ*.

Kennedy v. R. C. & B. R. Co. (54 Hun, 183), reversed.

(Argued October 28, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 19, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action to recover damages for injuries received through the alleged carelessness of defendant.

The following is the opinion in full:

“The judgment under review awards damages to the plaintiff for injuries sustained as a result of a fall from the platform of one of defendant’s street cars, and occasioned, as she alleges, by the negligent conduct of the person in charge of the car, which eventuated in its starting with a ‘sudden jerk’ as she was getting on.

“The appellant assigns for error, among other rulings properly presented by exception, that which permitted a sister of the plaintiff to testify to declarations of the plaintiff respecting her sufferings. The questions complained of and the answers thereto are as follows: Q. State, when she came home, did she complain at all? A. Yes, sir. Q. State what she complained of. Defendant’s counsel objected as incompetent. Received and exception. A. Complained of her side and head. Pain in her head and side, and didn’t get much sleep all night, and then the next morning when she got up she thought she would be able to go to work. Again the witness was interrogated with reference to the plaintiff’s appearance during her illness, and after testifying that she was pale around the mouth and eyes, she was asked: Q. Did you

notice those? A. Yes, sir; I noticed her eyes; they were dark, and she always complained of a numbness right up her side, and she had kind of a prickling sharp pain, and then she suffered considerable pain in her back.

“Defendant’s counsel moved to strike out the evidence that she said she had numbness and prickling pain in her side, as incompetent. Q. Did she say that when you observed evidences of distress; what was her condition when she made that remark; did she appear to be in distress? A. Yes, sir. Motion to strike out denied, and objection overruled and exception.

“While evidence of the character of that under consideration was admissible prior to the statute allowing parties to be witnesses, it is now definitely settled that a party cannot support his own testimony by proof of declarations to the same effect made to persons other than a physician, who is at the time in attendance professionally. (*Roche v. Brooklyn City & Newtown R. R. Co.*, 105 N. Y. 294.) Evidence of exclamations which are natural concomitants and manifestations of pain and suffering are still admissible, because regarded as involuntary and natural expressions which a witness may describe for the same reason that he may the appearance of the party. (*Hagenlocher v. C. I. & B. R. R. Co.*, 99 N. Y. 136.) Here, as in *Roche’s* case, the witnesses testified not to the involuntary exclamations indicating pain, but to answers given to questions asked. But it is urged in *Roche’s* case the objectionable evidence related to conversations occurring several weeks after the injury, while here they occurred within a few hours.

“There is no imaginary line somewhere between a few hours and a few days, or a few weeks, on one side of which declarations in favor of a party are admissible in evidence, while on the other they are inadmissible.

“Unless such complaints form a part of the *res gestæ* they cannot be admitted. And if they are so far detached from the occurrence as to admit of the deliberate design and be the product of a calculating policy on the part of the actors, then they cannot be regarded as a part of the *res gestæ*.

"Now, in this case, between the time of the accident and the declarations of pain, plaintiff had walked in a direction opposite to her home to the street-car barns and listened to the conversation which her sister had with the superintendent; then she walked up State street several blocks along which cars were passing every few minutes to 'the four corners,' where she took a car to Hubbell park, and then walked two blocks home. Certainly it cannot be asserted that this conversation was an incident of the injury in the sense that it emanated immediately from it, or that it stood in any immediate casual relation to the act of falling and its first effect, or that it was not so far separated from the occurrence as to admit of the formation of a plan to strengthen plaintiff's case against the defendant.

"The contention of the respondent that the evidence could not have harmed the defendant and, therefore, a reversal need not be had, in any event cannot be sustained. On the trial the defendant attempted to show by the testimony of physicians that the plaintiff was not injured to the extent, if at all, asserted by her. Physicians who had made a personal examination of the plaintiff testified that they could not discover any other than very slight evidences of injury. One of them indeed characterizing the plaintiff as a malingerer.

"With such an issue before them it certainly cannot be said that the jury in reaching a conclusion favorable to the contention of the plaintiff, did not attach some importance to the testimony of the witness who related what plaintiff had declared with reference to her pain and its location prior to the commencement of the action.

"The judgment should be reversed."

Thomas Raines for appellant.

P. Chamberlain, Jr., for respondent.

PARKER, J., reads for reversal.

All concur.

Judgment reversed.

NICOLA LOFRANO, Respondent, *v.* THE NEW YORK AND MOUNT
VERNON WATER COMPANY, Appellant.

(Argued October 28, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 12, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Isaac N. Mills for appellant.

Joseph S. Wood for respondent.

Agree to affirm ; no opinion.

All concur, except FOLLETT, Ch. J., not voting.

Judgment affirmed.

ROSE N. HANRAHAN, Appellant, *v.* THE MANHATTAN RAILWAY
COMPANY, Respondent.

(Argued October 30, 1891; decided December 1, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 23, 1889, which set aside a verdict in favor of plaintiff, sustained defendant's exceptions and directed a new trial.

Charles Strauss for appellant.

Samuel Blythe Rogers for respondent.

Agree to affirm order and for judgment absolute against the appellant ; no opinion.

All concur, except FOLLETT, Ch. J., not sitting.

Ordered accordingly.

ELIZABETH C. BARTLETT, Respondent, *v.* THE NEW YORK AND SOUTH BROOKLYN FERRY AND STEAM TRANSPORTATION COMPANY, Appellant.

(Argued October 23, 1891; decided December 8, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 6, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

George Zabriskie for appellant.

Thomas E. Rochfort for respondent.

Agree to affirm ; no opinion.

All concur, except PARKER, J., not voting.

Judgment affirmed. _____

ABIJAH WESTON et al., Respondents, *v.* LORENZ REICH, Appellant.

(Argued October 26, 1891; decided December 8, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1889, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee.

Abram Kling for appellant.

F. P. Bellamy for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

ENOCH H. GURNEY, Respondent, *v.* THE UNION TRANSFER AND STORAGE COMPANY, Appellant.

(Argued October 22, 1891; decided December 15, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made

February 7, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Sumner C. Chandler for appellant.

A. C. Fransioli for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

ENOCH H. GURNEY, Respondent, *v.* UNION TRANSFER AND
STORAGE COMPANY, Appellant.

(Argued October 22, 1891 ; decided December 15, 1891.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made February 7, 1890, which affirmed an order of Special Term denying a motion by defendant to correct the judgment herein and for a stay pending appeal.

Sumner C. Chandler for appellant.

A. C. Fransioli for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed. _____

THE LIDGERWOOD MANUFACTURING COMPANY, Appellant,
v. JOHN C. ROGERS et al., Respondents.

(Submitted December 1, 1891 ; decided December 15, 1891.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made January 7, 1889, which affirmed an order of Special Term denying a motion for a new trial.

Harriman & Fessenden for appellant.

E. T. Lovatt for respondents.

Agree to dismiss appeal; no opinion.
All concur, except POTTER, J., not voting.
Appeal dismissed.

ISABELLA CROZIER, Respondent, v. DAVID CRAIG, Appellant.

(Argued December 1, 1891; decided December 15, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 10, 1888, which affirmed an order in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

W. H. Johnson for appellant.

Edwin D. Wagner for respondent.

Agree to affirm; no opinion.
All concur, except FOLLETT, Ch. J., not sitting, and POTTER, J., not voting.
Judgment affirmed.

ADELBERT G. RICHMOND, Respondent, v. JOHN F. DIEFENDORF, Appellant.

(Submitted December 2, 1891; decided December 15, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 6, 1889, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court and affirmed an order denying a motion for a new trial.

Z. S. Westbrook for appellant.

No appearance for respondent.

Agree to reverse judgment and for new trial on authority of *Vosburgh v. Diefendorf* (119 N. Y. 337); no opinion.
All concur.
Judgment reversed.

DANIEL J. SPRAGUE, Appellant, *v.* THE BARTHOLDI HOTEL
COMPANY, Respondent.

(Argued December 1, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 7, 1889, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Circuit.

David Keane for appellant.

Nathaniel Myers for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

PETER C. ANTHONY, Appellant, *v.* LEOPOLD WISE et al.,
Respondents.

In an action to have an assignment, executed by defendant G., of certain judgments in his favor against the other defendants, set aside as fraudulent, and to compel a reassignment thereof to plaintiff, it appeared that the judgments were upon a claim of plaintiff, who, as he testified, being a non-resident, transferred the claim to G., who was irresponsible, for a nominal consideration to avoid giving security for costs. G. transferred the judgments to one who purchased as agent for the other defendants. In the action brought by G., the plaintiff here testified that he made the assignment to G. *bona fide* and absolutely. *Held*, that plaintiff was estopped from denying that the claim was the absolute property of G.

(Argued December 2, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department entered upon an order made January 28, 1889, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The following is the opinion in full:

"The plaintiff was a resident of New Jersey, and held a disputed claim for \$500 against the defendants Leopold Wise and Charles Wise. This claim he assigned to the defendant John Gillen, who brought suit thereon in the City Court of New York, and recovered judgment. An appeal was taken to the General Term of that court, where there was an affirmance and an additional judgment for costs. A further appeal was then taken to the Court of Common Pleas, and whilst such appeal was pending, Gillen, in consideration of the sum of twenty-five dollars, assigned and transferred the judgments to the defendant Marcus Wise, who purchased the same for and on behalf of the defendants Leopold and Charles Wise, and at their request, but subject, however, to attorney's liens for costs amounting to about \$200.

"The plaintiff herein, claiming to be the owner of the judgments, brings this action to have the conveyance by Gillen to Marcus Wise adjudged fraudulent, and that he be compelled to reassign the judgments to the plaintiff.

"The assignment of the claim by the plaintiff to Gillen was in consideration of the payment of one dollar, which payment was waived. The good faith of this transfer was questioned upon the trial of the Gillen action, and the plaintiff then testified that he had assigned the claim to Gillen *bona fide* and absolutely.

"Upon the trial of this action, he admitted that he so testified upon the trial of the former action, and further stated that he understood, in case he brought the action in his own name, that he would have to give security for costs; that he did not like to ask anyone to become bondsman for him, and that that was the reason he made the assignment; that he considered himself good; that he was informed and believed that Gillen was insolvent and worthless; that he thought that if Gillen failed to recover judgment upon the claim and a judgment for costs should go against him, not a dollar of it could be collected.

"Whatever equities may exist as between the plaintiff and Gillen, we quite agree with the learned General Term that the plaintiff, by his own testimony, is estopped from denying that the claim was the absolute property of Gillen.

“It is claimed, however, that after the trial, and after the jury had rendered a verdict, that then the plaintiff repurchased the claim from Gillen, paying him fifteen dollars therefor. The plaintiff so testifies, and that upon the payment of the money Gillen ‘said that the claim was mine. I could have it. He said he would make an assignment any time I asked it.’

“Subsequently, however, when an assignment of the judgments was presented to Gillen to be executed, he refused to sign the same.

“There is evidence that corroborates the plaintiff to some extent, but it is sharply controverted by the testimony of Gillen. Whilst he admits that he received on one occasion fifteen dollars, and on another occasion one dollar, he denies that there was any conversation after the recovery of the judgment, or after the jury came in with the verdict, in which he sold or agreed to assign the claim or the judgment to the plaintiff.

“Upon this conflict in the testimony the trial court has found that the allegations of the plaintiff, to the effect that he was the owner of the judgments, was not sustained by the evidence, and refused to find that there was a parol assignment of the judgments.

“This conclusion has been approved by the General Term, and such finding must, in this court, be regarded as final.

“If the plaintiff was neither the legal nor equitable owner of the judgments in question, he is not in a position to maintain the action. It will not, therefore, be necessary to consider the other questions discussed by the appellant.

“The judgment should be affirmed, with costs.”

A. J. Skinner for appellant.

John H. V. Arnold for respondents.

HAIGHT, J., reads for affirmance.

All concur.

Judgment affirmed.

ROMEYN B. AYRES, Respondent, v. THE VILLAGE OF HAMMONDS-
PORT, Appellant.

Plaintiff fell upon new ice formed the night before over an old accumulation of ice and snow upon a sidewalk in one of defendant's streets, which had been negligently constructed, so as to have too great a slope toward the street. *Held*, in an action to recover damages, that in the absence of evidence showing that the slope of the walk was a concurring cause of the fall, without which it would not have happened, plaintiff was not entitled to recover.

(Argued December 2, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department entered upon an order made October 1, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

The following is the opinion in full:

"This action was brought to recover for injuries sustained from a fall upon an icy sidewalk.

"The accident occurred about ten 'clock on the morning of February 27, 1885, on the south side of Shether street in front of the St. James Hotel. The sidewalk at that point was constructed of boards, was about ten feet wide and extended longitudinally thirty feet, the whole length of the hotel. Next east of the hotel the sidewalk was upon a lower level and the two walks were connected by three wooden steps.

"The hotel building was built upon the line of the street and was surmounted with a flat roof draining to the rear, having a mansard front without gutter or eavestrough and the water from that dripped upon the walk falling at a point from one to two feet outside of the wall of the hotel.

"The plaintiff based his claim of negligence against the village, first, in permitting the walk to be constructed in an improper and dangerous manner, and second, in permitting a dangerous accumulation of ice and snow thereon.

"The evidence permitted the jury to find that at the easterly end of the walk the slope from the building to the street gutter was seven inches, and that the easterly end of the building

having settled, had caused the walk to be lower there than at the west end, and these two elements tended to cause the water that fell upon the walk to flow towards the north-east corner thereof and there be discharged into the street, and this undue, and as it was claimed, unsafe pitch, was the negligent construction complained of.

“That between February tenth and the day of the accident, ice and snow had accumulated upon this walk ranging in depth from six inches, where the drip from the eaves fell, to an inch at the outer line of the walk and that in the angle of the steps referred to, ice had accumulated two or three inches thick. There was no ridge under the drip of the eaves of the building, but from the thickest part of the ice at that point there was a gradual slope to the outer edge of the walk. This condition of affairs was known to the president of the village and other officers thereof.

“The beginning of this formation of ice was in a heavy storm of rain, followed by extreme cold, on the tenth of February.

“The plaintiff testified that it rained hard on February ninth and that the temperature fell to twenty degrees below zero on the morning of the tenth; that the streets and roads were very icy, and it was an extraordinary time. From that day until the day before the accident the temperature remained below freezing, with the exception of two or three occasions in the middle of the day, and frequently fell below zero. There was one or two snow falls, one at least quite heavy, and once or twice it rained slightly.

“It appeared from the evidence offered by the defendant that on the day preceding the accident it thawed a little, and in the evening it rained. This was followed by sudden and severe freezing, the temperature falling to zero, and there was a slight fall of snow early on the morning of the twenty-seventh. This rain and freezing caused a new formation of ice.

“As to the circumstances attending the plaintiff's fall, it appeared that he was walking from the west toward the east, and he testified that when he was two-thirds of the way across the platform his foot slipped and he went down, then he

raised himself up with his hands. Again, he testified that when he slipped he was on the last plank of the walk at the top of the steps.

“On cross-examination he testified: ‘I walked about two-thirds of the way across before my foot slipped; I looked down at the walk and stepped to one side; all that I could see of the walk was what my feet covered when I slipped; I proceeded then to the last plank on the Richards (hotel) walk, then both my feet went out from under me.’

“The evidence does not make it clear whether the plaintiff fell twice, once two-thirds of the way across the platform and again on the last plank, or whether he regained his balance after the first slip and fell at the top of the steps. But it is plain from his evidence that the ice in the angle of the steps had nothing to do with the accident, and we may, therefore, dismiss that feature of the case from our consideration.

“The court, after denying over the defendant’s exception, a motion to dismiss the complaint made upon all the evidence, charged the jury that they might find negligence on the part of the defendant in permitting the walk to be constructed with an unsafe slope or pitch toward the street, and in permitting the ice and snow to accumulate thereon, and for the purposes of this appeal we assume that the evidence justified the submission of those two questions to the jury.

“The court instructed the jury to determine whether there was rain on the night of the twenty-sixth and a new formation of ice on the morning of the twenty-seventh, and charged them that the new ice thus recently formed could not be made the basis of a charge of negligence against the defendant, and for a fall thereon it was not liable.

“It then instructed the jury as follows: ‘Although the defendant may not have been responsible for the condition of the ice upon the walk, or responsible for any injury resulting from the existence of ice upon that walk, yet if the negligence of the defendant in permitting the construction of the walk in the form in which it was constructed, or in permitting it to remain as constructed, concurred, with the ice so formed upon the walk, in producing the injury, the defendant is responsible. * * * To find that, you must find that

this accident would not have occurred but for this construction. But if you find that the defective construction of that walk concurred with the thin ice to produce the result — if the result could not have been caused without defective construction — then the defendant is responsible.’

“I think the evidence as to the rain on the night of the twenty-sixth, and the new formation of ice on the morning of the twenty-seventh, was substantially undisputed, and if it was, it was error for the court to have submitted that question to the jury, but whether that was so or not, the exception to the charge just quoted was well taken, and as the judgment must be reversed, we may well leave the question as to the existence of the new ice to rest upon the evidence that will be produced upon a retrial.

“If there was no dispute as to the new ice, the motion to dismiss the complaint should have been granted, but, assuming that to have been in controversy, it was permissible, under the judge’s charge, for the jury to have found that the plaintiff fell upon new ice formed on the morning of the twenty-seventh, and to have placed their verdict on the fact that the slope of the walk was a concurring cause of the accident, without which it would not have happened, and in this view of the case it is not distinguishable in its essential features from *Taylor v. City of Yonkers* (105 N. Y. 202).

“In that case, as this, the plaintiff fell upon new ice recently formed over an old accumulation, and upon a sidewalk having, through the negligence of the defendant, a slope from its inner to its outer edge of eight inches, and for that reason assumed to be in a dangerous condition.

“There, as here, the jury were instructed that the new ice furnished no ground of negligence on the part of the defendant, but if the slope of the walk was a concurring cause of the fall, without which the accident would not have happened, the defendant was liable.

“But this court reversed the judgment in the case cited on the ground that the facts did not permit the jury to find the slope of the walk to have been a concurrent cause of the fall, and upon that question the cited case and the case at bar are precisely alike.

"In each case it appeared that the plaintiff fell upon new ice lying upon a slope.

"To infer from that fact alone that he would not have fallen if the new ice had spread over a level, and did fall because of the slight pitch of the walk, was said in the case cited to be 'mere guess and speculation.'

"We are compelled to the same conclusion, and nothing need be added to the reasons given in the *Taylor* case.

"The exception considered was well taken, and the judgment should be reversed and a new trial granted."

James H. Stephens for appellant.

J. F. Parkhurst for respondent.

BROWN, J., reads for reversal.

All concur, except BRADLEY, J., not voting.

Judgment reversed.

CHARLES H. HUNTER, Respondent, *v.* THE NEW YORK,
ONTARIO AND WESTERN RAILWAY COMPANY, Appellant.

130	669
155	162

(Argued December 3, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 12, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and denied a motion for a new trial.

William Van Amee for appellant.

M. H. Hirschbery for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

GEORGE HOTIS, Appellant, *v.* THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY, Respondent.

(Argued December 3, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 17, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit.

E. Countryman for appellant.

Hamilton Harris for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE TRUSTEES OF THE VILLAGE OF GENEVA, Appellant,
v. THE BRUSH ELECTRIC COMPANY of Cleveland, Ohio,
Respondent.

(Argued December 3, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which denied a motion for a new trial and ordered judgment for defendant upon a verdict directed by the court.

Arthur P. Rose for appellant.

William E. Cushing for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOHN DYE, Respondent, v. THE DELAWARE, LACKAWANNA
AND WESTERN RAILROAD COMPANY, Appellant.

While, when in an action against a railroad or municipal corporation to recover damages for injuries alleged to have been caused by defendant's negligence, it is important to show that defendant had notice of the dangerous character of the defect which caused the injury, testimony is competent to prove other similar accidents, such evidence is not competent where it can have no bearing upon the issues presented.

Where, therefore, in an action by an employe against a railroad company to recover damages for injuries sustained by plaintiff when engaged in coupling two cars, occasioned by the overlapping of the dead-woods of the cars, defendant claimed that plaintiff had full knowledge of and took the chances of the danger, and gave evidence to the effect that it used on its road different kinds of cars, some without any dead-woods and that switchmen in its employ had frequently to make couplings of cars, the dead-woods of which overlapped, *held*, that the admission of testimony showing that similar accidents had occurred on defendant's road was error.

(Argued December 4, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered on an order made December 9, 1889, which affirmed a judgment in favor of the plaintiff entered upon a verdict.

This action was brought to recover damages for personal injuries sustained by the plaintiff, an employe of the defendant, alleged to have been caused by defendant's negligence.

The accident happened on the 17th of October, 1887, while plaintiff was engaged in coupling cars. The cars which he was attempting to couple he described as a jimmy and a chronic car. The jimmy was a four-wheeled coal car, considerably lower than the eight-wheeled car, which he called a chronic car. So, when the two cars came together, the dead-woods of the eight-wheeled car, instead of meeting the dead-woods of the jimmy, thus keeping the cars at a sufficient distance apart to enable a person to stand between them, overlapped, causing the cars to come so nearly together that the plaintiff was severely injured.

The plaintiff commenced working on railroads about fifteen years prior to the accident, during which time he had served

in different capacities, such as brakeman, baggageman and switchman. At the time of the accident, and for several months prior, he had been a member of a switching gang connected with the work of making up and distributing trains between the yard at East Buffalo and the yard at the foot of Erie street. At the East Buffalo yard the trains coming from the east are broken up and distributed by switch engines and their crews. Loaded and unloaded cars are brought from different points in the city, including other railroad yards, by the switch engines to the yard at East Buffalo, and are there made up into trains to go east. The crews connected with the switch engines do all the switching, coupling and uncoupling required in this business, and it was of such a crew that the plaintiff was a member. It appears that on defendant's railroad there are a number of different kinds of cars in use, on some of which there are no dead-woods at all, while on others there are short dead-woods. And the evidence tended to show that it was a matter of frequent occurrence that when the jimmies and the eight-wheeled cars came together the dead-woods would overlap, and the switchmen, in doing their work, had daily to make couplings between such cars. The plaintiff, however, denied having any knowledge that such dead-woods would overlap, prior to the happening of the accident.

Further facts are stated in the opinion, which is given in full.

“An exception taken to the admission of certain testimony against the objection of the appellant requires a reversal of the judgment.

“The defendant did not attempt to controvert the claim of the plaintiff, that his injury was occasioned by the overlapping of the dead-woods of the jimmy and the eight-wheeled car, thus permitting the cars to come so close together as to necessarily severely injure a person who happened to be between them at the time; nor was it pretended that the difference in the height of the dead-woods of the respective cars did not render their coupling in the ordinary and usual way dangerous. On the contrary, the defendant not only conceded but introduced testimony tending to show that it had in use on its road many different kinds of cars, some without any dead-woods

whatever. That, in addition, there came on its road, in the regular course of business, cars from other railroads, differing in their height, method of construction and mode of coupling.

"It sought to show that these facts were well-known to the plaintiff and to the members of the various switching crews, who, as a part of their work, were obliged to couple and uncouple cars for distribution from the yard in East Buffalo to various other points in the city, and for collection from the yards of other railroads for the purpose of making them up into solid trains to go east. Its object was to bring the plaintiff within the rule, that an employe who enters upon the discharge of duties which he understands to be dangerous, and continues in such employment after becoming fully aware of the faults of construction which render his work particularly hazardous, will be deemed to have assumed all the obvious risks incident to such employment.

"This being the ground on which the defendant mainly claimed freedom from liability, the plaintiff was, nevertheless, permitted to show, after he had rested his case and on the cross-examination of one of the defendant's witnesses against the objection of the defendant, that similar accidents had occurred on defendant's road prior to the one in question.

"It is not seen how this evidence could have any legitimate bearing on the questions in issue, while it may have had the effect to encourage the jury to give a larger verdict against the defendant than they otherwise would.

"It is the general rule that proof of similar accidents is not admissible in evidence. This rule has exceptions, it is true.

"In *Pomfrey v. Village of Saratoga Springs* (104 N. Y. 459), a witness who was testifying as to the condition of the sidewalk at the time of the injury, which was the subject of the action, was permitted to testify that he had fallen there himself, and it was held to be competent because it tended to show how he came to know the condition of the sidewalk.

"It has been held that such evidence is competent in a class of cases where it is important to show that the defendant had notice or was warned of the dangerous character of municipal sidewalks, or of the inadequacy of facilities provided for the

passage of passengers to and from trains over the company's premises. (*Gillrie v. City of Lockport*, 122 N. Y. 403; *Brady v. Manhattan Railway Co.*, 127 id. 46.)

"But the exceptions to the rule have not been and should not be so far extended as to permit such testimony in a case where it can have no bearing whatever on the issues; otherwise the general rule, which is well grounded, would be overthrown.

"In the case before us it did not tend in any degree whatever to the establishment or support of plaintiff's cause of action to show that the defendant had knowledge of the dangers incident to the coupling of cars, such as those which were the occasion of plaintiff's injury.

"It follows that a reversal of the judgment is required and we need not consider the other questions presented.

"The judgment should be reversed."

John G. Milburn for appellant.

Ernest K. Weaver for respondent.

PARKER, J., reads for reversal.

All concur, except POTTER and VANN, JJ., not voting.

Judgment reversed.

JACOB P. STOCKSDALE, Respondent, v. WALTER G. SCHUYLER,
Survivor, etc., Appellant.

(Argued December 7, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 24, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court and affirmed an order denying a motion for a new trial.

De Witt C. Brown for appellant.

Stephen B. Jacobs for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

CHARLES A. POST, Respondent, *v.* WILLIAM A. SIMMONS,
et al., Appellants.

(Argued December 8, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 15, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

Evarts, Choate & Beaman for appellants.

J. Langdon Ward for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

CHARLES H. WILSON, Respondent, *v.* THE BROOKLYN ELE-
VATED RAILROAD COMPANY, Appellant.

(Argued December 8, 1891; decided December 23, 1891.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made March 25, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Edward H. Rand, Jr., for appellant.

M. L. Towns for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

HANNAH C. BRINK, Respondent, *v.* GUARANTY MUTUAL
ACCIDENT ASSOCIATION, Appellant.

(Argued December 8, 1891; decided December 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

made December 27, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Raphael J. Moses, Jr., for appellant.

William F. O'Neill for respondent

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

FRANK B. HODGKINS, Respondent, *v.* SARAH F. MEAD,
Appellant.

(Argued December 8, 1891; decided December 23, 1891.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made March 21, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

F. E. Dana for appellant.

Henri Pressprich for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

JAMES G. TINSLEY et al., Respondents, *v.* PAUL WEIDINGER,
Appellant.

(Argued December 9, 1891; decided December 23, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made the first Monday of March, 1890, which affirmed a judgment in favor of plaintiffs entered upon a verdict directed by the court, and affirmed an order denying a motion for a new trial.

Edward W. S. Johnston for appellant.

Michael H. Cardozo for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

CHRISTOPHER B. KEOGH et al., Appellants, v. FERDINAND R.
MINRATH, Impleaded, etc., Respondent.

(Argued December 9, 1891; decided December 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 14, 1890, which overruled plaintiffs' exceptions and directed judgment in favor of defendant entered upon an order dismissing the complaint on trial.

E. J. Myers for appellants.

F. R. Minrath for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

JOHN H. SMITH, Respondent, v. JOHN SATTERLEE et al.,
Appellants.

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In an action upon a disputed claim it is not competent for plaintiff to prove an offer to compromise by paying a specified sum, made by defendant for the purpose of procuring a settlement of the controversy.

(Argued December 9, 1891; decided December 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1888, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The following is the opinion in full:

"The complaint alleged an indebtedness on the part of the defendant to one Lutz for services rendered and his assignment of the demand to the plaintiff. The answer denied any indebtedness to Lutz, and averred that prior to the assignment of

Lutz's alleged claim to the plaintiff he became indebted to the defendants in a sum exceeding the amount for which the plaintiff demanded judgment.

"It was not disputed on the trial that Lutz rendered the services for which plaintiff sought to recover, nor their value. But the defendant attempted to prove that Lutz was entrusted with a sum of money due one Minshull, then an engineer on Lutz's division; that Lutz converted the money to his own use, and thereafter the defendants were compelled to pay Minshull such amount.

"Whether Lutz did or did not receive and retain the money intended for Minshull was the only question in the case.

"The defendants' evidence tended to show a request by Lutz of the paymaster for Minshull's money, that it was properly counted, put in an envelope, and placed on the desk with the other pay envelopes which were taken by Lutz to the employes on his division. Lutz denied having received or asked for it.

"The defendant Satterlee testified that Lutz admitted to him that he received the money, but had lost it, as he supposed, out of his overcoat pocket. And in further support of defendants' contention, it was proved that Minshull did not receive his money at the time the other employes on the division received theirs, but that it was paid to him by the defendants about eight days later and by check.

"The plaintiff, against defendants' objection and exception, put in evidence a letter written over a year after this action was commenced, of which the following is a copy:

'63 BROADWAY, NEW YORK, *April 16th*, 1884.

'J. H. SMITH, ESQ.:

'DEAR SIR. — Yours of the 14th inst., is at hand, and contents noted. To save cost and stop further litigation, we are willing to send you our check for fifty (\$50) dollars in full liquidation of your claim. Please let us hear from you.

'Yours, etc.,

'JOHN SATTERLEE & CO.'

"The defendants then moved that it be stricken out, but the motion was denied and the exceptions thus taken are assigned

for error on this review, and must be sustained because the letter does not contain an admission of a fact, but rather an offer of compromise, made for the purpose of procuring a settlement of a pending controversy. (*Laurence v. Hopkins*, 13 Johns. 288; *Warner v. Richmond*, 3 Den. 58; *Draper v. Hatfield*, 124 Mass. 53.)

“ We cannot agree with the learned judge at General Term that the judgment should not be reversed because the admission of the letter could not have affected the result. It is not seen how this court can determine what effect it had on the mind of the referee who admitted it as evidence, and then refused to strike it from the record. Presumably it was considered in connection with the other evidence which induced a finding favorable to the plaintiff.

“ The judgment should be reversed.”

T. C. Cronin for appellants.

Frank Cumesky for respondent.

PARKER, J., reads for reversal.

All concur.

Judgment reversed. _____

HARSHAW SCOTT, Respondent, v. THE PENNSYLVANIA RAILROAD COMPANY, Appellant.

In an action to recover damages for injuries received while crossing defendant's tracks, it appeared that plaintiff, before stepping upon the first track, looked both ways, but did not look again towards the west, from which direction he knew a train was due; he crossed the first and second tracks and walked east, between the second and third tracks, so near the latter that he was struck by said train. The rumble of the approaching train was distinctly heard by other people in the vicinity. *Held*, that plaintiff was guilty of contributory negligence.

(Argued December 10, 1891; decided December 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 14, 1890, which affirmed a judgment in favor of the plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

The following is the opinion in full :

“ We think this judgment must be reversed upon the ground that the plaintiff's negligence contributed to his injury.

“ Plaintiff's own testimony — and there is no other in his favor in this respect — is that he looked both ways just before he stepped upon the first track, and looked no more towards the west, from which direction he knew the express train was then about due and would pass without stopping upon the third track. He turned his footsteps toward the east and proceeded diagonally with respect to the tracks, with his back toward the west, crossed the first and second tracks, walked between the second and third tracks, not upon the third track, but so near it that the train coming up from behind him struck him and threw him upon the pilot of the locomotive. He had on a heavy ulster overcoat, with the collar turned up about his neck and ears. It is true that it was about half an hour before sunrise and a foggy morning. But the air was still and the rumble of the coming train was distinctly heard by others. Irrespective of the question of defendant's negligence we think the plaintiff was negligent in that he omitted to keep his eyes and ears properly alert, regard being had to the dangers of the situation known to him. If he had again looked toward the west before he came so near the third track as to be within the stroke of a train passing upon it he probably would have seen the train in time to avoid it. To enter this known place of danger and to continue to walk in it without again looking to see, or listening to hear, whether any train was approaching from behind him, seems to us, under the circumstances, to be inexcusable.

“ The judgment should be reversed and a new trial granted, with costs to abide event.”

Osborn E. Bright for appellant.

Austin G. Fox for respondent.

Per curiam opinion for reversal.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment reversed.

ALBERT J. RISS, Respondent, v. DANIEL MESSMORE, Appellant.

(Argued December 10, 1891; decided December 23, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 6, 1890, which modified and affirmed as modified a judgment in favor of plaintiff, entered upon the report of a referee.

Moody B. Smith for appellant.

Charles S. Miller for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

SPENCER KELLOGG et al., Respondents, v. GEORGE FARQUHAR, Jr., et al., Appellants.

(Argued December 11, 1891; decided December 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Circuit without a jury.

Backus W. Huntington for appellants.

Spencer Clinton for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

WILLIAM H. HUSSEY, Respondent, v. WEEKS W. CULVER et al., Appellants.

(Argued December 11, 1891; decided December 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order

made March 14, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

D. Edgar Anthony for appellants.

George C. Lay for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOHANN REICHEL, Respondent, *v.* THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Plaintiff, a laborer in defendant's employ, was engaged in shoveling ashes from a pit between the rails. In attempting to get out of the pit as a locomotive approached, he was struck by it and injured. Near the pit was a water-plug so arranged that a locomotive, discharging ashes into the pit, could at the same time take water. The court submitted the question to the jury as to whether the relative position of the water-plug and the stopping place on the ash-pit was an improper and negligent construction. *Held*, error.

Defendant provided two employes for locomotives running to the ash-pit and water-plug. *Held*, that negligence could not be imputed to it from the fact that but one of these employes was on the locomotive at the time of the accident, and that a refusal to so charge was error.

(Argued December 4, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, in favor of plaintiff, entered upon an order made November 17, 1887, which overruled defendant's exceptions and directed judgment on a verdict.

The following is the opinion in full:

"This action was brought by an employe against his employer to recover damages for a personal injury occasioned by the negligence of a co-employe. The accident occurred in the yard of the West Shore Railway at Buffalo, while that corporation was in the hands of receivers. Afterwards, the defendant became the lessee of their railway and assumed the liabilities of its receivers.

“The gravamen of the complaint is that the receivers negligently employed an unskillful and careless servant, whose negligent conduct on the occasion in question caused the injury. The negligence of the receivers is set forth in the following language :

“‘That on or about the 7th day of May, 1885, the said receivers of said railway so negligently and carelessly conducted, directed and managed said railway and their employes, and employed, engaged and continued in their service upon said railway, unskillful, incompetent and unlearned workmen, known to said receivers, or of which they had means of knowledge, whereby the injury was occasioned. * * *’

“‘That said injuries were caused solely and by reason of the negligent and careless directions and management of said railroad and the employes by said receivers, and the negligent and careless employment of unskillful, unlearned, reckless, incompetent and worthless workmen in, about and upon said locomotives, yards, tracks, dangerous machinery, etc., and in the operation thereof, at their instance, and with full knowledge or means of knowledge of said receivers.’ Wilber C. Sartwell, the engineer in charge of the locomotive at the time of the accident, was the only employe whose skill and care the plaintiff attempted to impeach on the trial, and the only negligence imputed to him as a cause of the accident was that he approached the ash-pit with his locomotive without ringing its bell.

“Whether it was rung was a disputed question of fact, and so was the issue whether Sartwell had previously been unskillful and reckless in moving locomotives in the yard, to the knowledge of his superior officers, or so frequently and under such circumstances that it was negligent in them not to have known of his conduct.

“Whether the court erred in submitting these questions to the jury, or in the instructions by which they were submitted, need not be considered, as we think a new trial must be granted for an instruction relating to another branch of the case. The court said : ‘It is claimed by the plaintiff that the negligent and improper construction of the defendant’s track, and the relative position of the water-plug, and the stopping place on

the ash-pit, was an improper and negligent construction of it. It is for you to say whether that is so.'

"To this instruction the defendant took an exception and asked in various forms the court to instruct the jury that there was no evidence which would authorize them to find that the yard was improperly or negligently constructed, which was refused, and an exception taken. In this we think the court erred. At the time of the accident there was in the defendant's yard at Buffalo, a round-house, with stalls or compartments for twenty locomotives, which faced east, and immediately in front, partly within and partly without the segment of the circle occupied by the building is a turn-table, from which four tracks extended easterly, and were connected by switches with various tracks in the yard. Track No. 1 was known as the ash-pit track; No. 2, as the turn-table and yard track; No. 3, as the coal track; No. 4, as the back track. One hundred and twenty feet east of the turn-table, and between the rails of track No. 1, there was an excavation one hundred and seventy feet in length and from three to four feet in depth, called an ash-pit, into which ashes from the locomotives were dumped, and afterwards shoveled out and carried away. Twenty-nine feet east of the east end of this pit there was a water-plug, from which water for the locomotives was taken, and also water to cool the ashes in the pit. Further east this track curved to the right.

"When a locomotive headed west towards the round-house stops opposite to this plug to take water, it covers twenty-five or thirty feet of the east end of the ash-pit, and water was taken and ashes dumped at the same time. Afterwards the locomotive was moved by the power of its accumulated steam into the round-house.

"It was the custom of the defendant to give water to their locomotives which were going into the round-house, and free them from ashes, in the way described. Before April 30, 1885, the plaintiff had never been employed about a railroad, but on the date mentioned he hired to the receivers of the West Shore Company to work as a common laborer in the Buffalo yard. He was hired by Henry Conrad, who was sworn as a witness for the plaintiff, and testified: 'I hired this

man Reichel. He understood the kind of work he was to do. He was to go shoveling these things and do work around the round-house. He went to work with the other men, and was doing this wrecking off and on to the day of the accident. I had eight or ten men in my employ at that time. I saw this man Reichel there; he is a fairly intelligent man, appears to know his business, and to be able to attend to it.' The plaintiff testified that Conrad notified him to look out for the locomotives.

"On the 7th of May, 1885, the plaintiff was engaged in shoveling ashes from the east end of this pit, and seeing a locomotive approaching from the east, attempted to get out of the pit, but he was caught and his left leg crushed by the wheels of the locomotive, so that amputation was necessary. Frank Brenning, who was at work in the pit with the plaintiff, lay down, upon the approach of the locomotive, and was not injured. The only evidence of negligent construction of the defendant's yard was in the nearness of the water-plug to the ash-pit.

"It was shown by undisputed evidence that the usual mode of freeing locomotives of their ashes before taking them into the round-house was by means of ash-pits like the one in use in this yard, and we do not think the jury should have been instructed that they might find that the yard was improperly constructed on the simple, isolated fact that the ash-pit and water-plug were so located that a locomotive could take water and be freed from its ashes at the same time.

At the time of the accident, and for a few months previous thereto, but one person, Sartwell, the engineer, was on the locomotive. Some discussion occurred between the court and counsel, after the charge had been delivered, as to whether the defendant could be found liable because a second man was not on the locomotive at the time of the accident.

"Among other requests, the following was preferred, declined, and an exception taken: 'I ask the court to charge that, the evidence being undisputed, that in the performance of the work in the shop yard, in the operation of the road, that the engines were always operated by one hostler, and that such method had been found sufficient in the business of the

road up to the time of the injury. The jury cannot consider the fact that there was but a hostler, and not also a helper, on the engine with him, as a ground for finding that the receivers failed to furnish a sufficient number of men to run the engine and operate it properly.'

"Philip Sauer, a witness who testified in behalf of the plaintiff, said: 'I saw Mr. Reichel after the accident happened. They had taken him out and were putting him on the engine to take him up to the city. Mr. Sartwell was in charge of that engine. I know Mr. Sartwell; he was working with me; I was helping him. He was a hostler on running engines in and out there. I had assisted him not more than a week.' * * *

"'I was helping Sartwell. Seventy-nine was the number of the engine that caused the injury to this plaintiff. I was in the round-house at the time of the accident. That is about two hundred feet away.' * * *

"'I was on this particular engine, No. 79, during the time that it came up to the switch. I do recollect the circumstance whether or not the bell was ringing on that engine. I wouldn't say positively whether she stopped at the water-plug. I got off the engine at the switch, and I wouldn't go up that track to the round-house. I would go around back of the round-house and up into the round-house, but, of course, I didn't go up the other track until after he started with the engine. It was moving when I left it at the switch, and couldn't see it any more after I walked ten feet.'

"'At the time I jumped off this engine at the switch, I didn't see it, except for about ten feet. I then lost sight of it and went around to the round-house. To get to the round-house it didn't take, but I should say, a moment or two.'

"The defendant did not negligently fail to provide this locomotive with two employes, for the undisputed evidence is that Sartwell was employed as the engineer and Sauer as his helper. The fact that the helper did not ride on the locomotive on its trip from the switch to the round-house, was not, so far as is disclosed by the evidence, the fault of the defendant, but of Sartwell or of Sauer, both of whom were co-employes with the plaintiff. The defendant was entitled to have

the jury instructed that negligence could not be found from the fact that but one person was on the locomotive at the time of the accident.

"The judgment must be reversed and a new trial granted, with costs to abide the event."

James F. Gluck for appellant.

E. C. Sprague for respondent.

FOLLETT, Ch. J., reads for reversal.

All concur.

Judgment reversed.

ERASTUS H. BARNES, Respondent, v. WALTER P. DENSLOW
et al., Appellants.

(Argued December 7, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 14, 1890, which modified and affirmed as modified a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

Van Buren Denslow for appellants.

N. B. Hoxie for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOSEPH P. TOMS, Respondent, v. HENRY GREENWOOD et al.,
Appellants, et al., Respondents.

(Argued December 16, 1891; decided January 20, 1892.)

APPEAL from order of the General Term of the Superior Court of the city of Buffalo, made April 9, 1890, which denied a motion for a new trial and affirmed an interlocutory judg-

ment, entered upon a decision of the court on trial at Special Term.

Simon Fleischmann for appellant.

Frank C. Ferguson for respondents.

Agree to affirm ; no opinion.

All concur.

Order affirmed. _____

VAN ALLEN PUGSLEY et al., Respondents, v. JOHN DEVLIN,
Appellant.

(Submitted December 16, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made April 20, 1890, which affirmed a judgment in favor of plaintiffs, entered upon a verdict and affirmed an order denying a motion for a new trial.

Horace Graves for appellant.

Edward F. Brown for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

PHILIP GOERLITZ, Appellant, v. CHARLES MALAWISTA et al.,
Respondents.

(Argued December 18, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 14, 1890, directing judgment in favor of defendants upon a case submitted under section 1279 of the Code of Civil Procedure.

E. Ellery Anderson for appellant.

A. Stern for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

FRANCIS DOUGHERTY et al., Respondents, *v.* HENRY J.
McGUCKIN, Appellant.

(Argued December 23, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 6, 1890, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee.

Daniel P. Mahony for appellant.

Hector M. Hitchings for respondents

Agree to affirm ; no opinion

All concur.

Judgment affirmed. _____

RICHARD PIGGOTT, Respondent, *v.* LYNN H. HANCHETT,
Appellant.

(Submitted December 23, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 27, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Wm. Mullen for appellant.

George J. Greenfield for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JACOB KENT, Respondent, *v.* JACOB CROUSE, Appellant.

(Submitted December 23, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 29, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

M. M. Waters for appellant.

Franklin Pierce for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

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MARY J. ODELL, Respondent, *v.* THE NEW YORK ELEVATED RAILROAD COMPANY et al., Appellants.

While, for land taken by an elevated railroad company, the full market value must be paid without deduction for benefits, in considering the question as to damages caused by the road to lands not taken, or to the property rights of an abutting owner in the streets through which its road runs, its advantages and disadvantages, benefits and injuries must be considered, and if the benefits equal or exceed the injuries, no damages can be awarded.

(Argued October 9, 1891; decided January 26, 1892.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city and county of New York, entered upon an order made November 8, 1889, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action to restrain the operation of an elevated railroad in a street in New York city, upon which premises owned by plaintiff abutted, and to recover damages.

The opinion is given in full.

“The judgment appealed from awards \$1,200 damages, and enjoins the defendants from the further maintenance and operation of their elevated railway in front of the plaintiff's premises, unless within a time fixed they pay to the plaintiff the sum of \$4,000, the value of the easement appurtenant to the premises.

"In submitting the case upon the trial, the defendants' counsel requested the court to find that 'The depreciation caused by the elevated road in the rentals of the living apartments of said building is less than the appreciation or increase caused by the elevated road in the rentals of the store or first floor of said building.' This request was refused as irrelevant, and the exception taken by the defendants to such refusal presents the only question which we are here called upon to determine. The evidence was of such a character as to permit the finding asked for. The refusal of the court as 'irrelevant' leads us to conclude that it was supposed that the appreciation or increase of the rental value caused by the road could not be considered in determining the amount of damages that should be awarded. The question of benefits has been recently considered in the case of *Newman v. M. E. R. Co.* (118 N. Y. 618), and in *Bohm v. M. E. R. Co.* (Court of Appeals decisions, Jan. 20, 1892),* in which it was held that as to land taken by the railroad company the full market value must be paid without deduction for benefits. But as to the effect of the road upon lands not taken, its advantages and disadvantages, benefits and injuries must be considered, and if the benefits equal or exceed the injuries, no damages can be awarded.

"We have carefully examined the case for the purpose of determining whether the trial court considered or made allowance for the benefits, but are unable to find any ruling which satisfies us that the question of benefits was determined.

"The other questions presented by the record have already been disposed of. (*Pappenheim v. M. E. R. Co.*, 128 N. Y. 436.)

"The judgment should be reversed and a new trial granted, costs to abide the final award of costs."

Brainard Tolles for appellants.

Charles Gibson Bennett for respondent.

HAIGHT, J., reads for reversal.

All concur.

Judgment reversed.

* 129 N. Y. 576.

MARY J. MORGAN, Respondent, v. THE NEW YORK AND MASSACHUSETTS RAILWAY COMPANY, Appellant.

In an action under the General Railroad Act (§ 18, chap. 140, Laws of 1850, as amended by chap. 95, Laws of 1890), to recover the amount of an award for land taken for railroad purposes, it appeared that defendant was the successor of the P. & E. R. R. Co., that the original order confirming the commissioners' report was delivered by the counsel for that company to the county clerk, and was copied at full length in a book indorsed P. & E. R. R. Co. orders, with the words "entered and recorded" at the end thereof. Defendant claimed that the order should have been recorded in the book of deeds, and that the recording of the original order, instead of a certified copy thereof, was not in compliance with the law. *Held*, untenable; that there was a substantial compliance with the statute, and defendant, having caused the order to be recorded as it was, it would not be permitted to object.

(Submitted October 30, 1891; decided January 26, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

This action was brought to recover the amount of an award for lands of plaintiff taken by defendant for railroad purposes.

The following is the opinion in full:

"The question presented upon this appeal is whether the evidence showed conclusively that the provisions of section 18 of the General Railroad Act had been complied with, so as to establish a debt against the defendant for the amount of an award made in a proceeding instituted by the defendant to acquire lands of the plaintiff for railroad purposes.

"We decided in the case of *Lent* against the same defendant,* at this term of the court, that it was essential to constitute a cause of action against a railroad corporation for the amount of an award for land taken for railroad purposes, that it should be alleged in the complaint that the final order confirming the commissioners' report, or a certified copy thereof, had been recorded at full length in the clerk's office of the county where the land was situated, and until that act was performed, there was no debt against the company.

**Ante*, page 504.

“The complaint in this action contained such an allegation which the answer denied, and the issue thus raised was the only one considered at the trial.

“The question is no longer one of general importance as the amendment of the Code in 1890 has established a new proceeding for the taking of lands under the power of eminent domain, and the laws as they existed prior to that time have been repealed. (Laws of 1890, chap. 95.)

“We are of the opinion that there was in this case a substantial compliance with the statute. The defendant was the successor of the Poughkeepsie and Eastern Railroad Company, and it appeared that the real estate was situated in Dutchess county, and the proceeding was instituted and brought before the court in that county.

“The original order confirming the report signed by the justice who presided at the court which granted it, was, by the counsel for the railroad company, delivered to the county clerk, and the expense of entering and recording it charged to him.

“It was copied at full length into a book kept by the clerk in his office, indorsed ‘Poughkeepsie & Eastern R. R. Co., orders,’ and at the end of the order, made by the clerk who copied it into the book, were the words ‘Entered and recorded August 18, 1888.’

“The appellant contends that this was not such a recording as required by the statute for two reasons:

“*First.* That the order should have been recorded in the book of deeds.

“*Second.* That the recording of the original, instead of a certified, copy did not comply with the law.

Final orders in proceedings taken to acquire title to land under the power of eminent domain are statutory conveyances of real estate, and the first objection might have some foundation in the provision of the general recording act if the rights of a subsequent purchaser in good faith of the same real estate, or a portion thereof, were involved.

“But in this case the final order was delivered to the county clerk by the defendant, and it caused it to be recorded at full length in the book referred to, and it cannot now be permitted

to claim that such act was not a substantial compliance with the statute, and created a debt from it to the land owner.

“The second objection is without merit. Recording the original order, which remained on file in the same office, was a substantial compliance with the statute. The defendant caused that act to be done and cannot now be allowed to deny its efficacy. The order confirming the report was made August 13, 1888, and affirmed by order of the General Term February 14, 1889. This action was commenced in March, and tried in July, 1889.

“There is no suggestion in the answer, and no evidence on the trial, that the defendant intended or desired to abandon the proceeding, and its rights have not been prejudiced or abridged.

“The defense was without merit, and the judgment should be affirmed.”

Robert F. Wilkinson for appellant.

Horace D. Hufcut for respondent.

BROWN, J., reads for affirmance.

All concur.

Judgment affirmed. _____

FREDERICK N. SMITH, as Receiver, etc., Appellant, *v.* ROSALIE
HAHN et al., Respondents.

(Argued January 20, 1892; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 10, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

George A. Stearns for appellant.

James T. Olwell for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

WILSON S. TIFFT, Respondent, *v.* THE CITY OF BUFFALO,
Appellant.

(Submitted January 21, 1892; decided February 9, 1892.)

APPEAL from order of the General Term of the Superior Court of Buffalo, made November 19, 1889, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial without a jury, and granted a new trial.

W. F. Worthington for appellant.

Giles E. Stilwell for respondent.

Agree to affirm and for judgment absolute against defendant on stipulation; no opinion.

All concur.

Order affirmed and judgment accordingly.

JOSEPH LEVI et al., Respondents, *v.* EDWARD S. NEWHALL
et al., Appellants.

(Argued January 21, 1892; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 4, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

Galen R. Hitt for appellants.

A. J. Simpson for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MILO A. DANIELS, Respondent, v. JOSEPH W. SMITH,
Appellant.

Although a finding of fact by a referee is wholly unsustained by evidence, if not excepted to, no legal question is presented which the court may pass upon.

An exception in terms to the referee's conclusion of law cannot avail the party excepting, if such conclusion was required by the findings of fact on which it was based.

Upon a trial before a referee defendant presented requests to find, which were refused. He thereupon excepted as follows: Defendant separately excepts "to the refusal of the referee to find each of the several seventeen conclusions submitted to the referee by the said defendant so far as the referee's conclusions are not in conformity therewith." *Held*, that such exception was not sufficiently definite and specific to present a question for review.

(Argued January 21, 1892; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 16, 1889, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The following is the opinion in full:

"The complaint alleged an indebtedness on the part of the defendant for goods sold, services rendered, money loaned and a balance due from the proceeds of a saw-mill owned by the defendant and operated by the plaintiff under an agreement that he should have one-half of the earnings thereof for his services. The answer put in issue the allegations of the complaint, set up a counter-claim and prayed for an accounting of the business done at the saw-mill.

"The referee found in favor of the plaintiff in the sum of \$570.79, and his findings come to us approved by the General Term.

"The appellant, however, seeks to press upon our attention his claim that the referee erred in his first, third and tenth findings of fact, in that there is no evidence to support them. But his exceptions do not permit their review. Where a finding of fact is wholly unsustained by evidence, it is deemed a ruling on a question of law which, if excepted to, presents a

legal question which this court may pass upon. (*Halpin v. Phenix Insurance Company*, 118 N. Y. 165.)

"The defendant did not except to either of the findings of which he complains. He did except in terms to the referee's conclusion of law, but that exception cannot avail him because it was required by the findings of fact on which it was based. Nor can he call in question the refusal of the referee to find as requested by him, because not properly excepted to. His only exception in that regard is as follows:

"The defendant also separately excepts to the refusal of the referee to find each of the several seventeen conclusions submitted to the referee by the said defendant so far as the referee's conclusions are not in conformity therewith."

"An exception thus taken is not sufficiently definite and specific to present a question for review. (*Newell v. Doty*, 33 N. Y. 83; *Ward v. Craig*, 87 id. 550.)

The other exceptions to which our attention is directed, have reference to the admission of testimony to which the defendant objected on the ground that the plaintiff was attempting to show the contents of a written order by parol, and a subsequent refusal to strike out the testimony objected to and similar testimony of other witnesses not objected to on the same ground. The plaintiff testified without objection that October 1, 1873, the defendant asked him for a loan of \$150 for three days; that one Clark was owing him that amount for house rent, and he gave the defendant an order on Clark for such amount, who gave him the money. Subsequently the defendant paid \$60 on account of the loan, the balance remaining unpaid at the time of the trial. No motion was made to strike out this testimony until after the evidence was all in. The defendant instead attempted to controvert it. He testified that he had no recollection of such a transaction, while Clark asserted positively that he never received such an order and did not give the defendant any money. In rebuttal, the plaintiff called Mrs. Daniels, who testified that she was present when the plaintiff gave Smith the order for \$150. Then, for the first time, the objection now assigned for error was made. No motion was made in that connection to strike out all the evidence in the case relating to that subject, and it was not,

therefore, legal error for the court to receive this further testimony on a subject with reference to which the defendant's witnesses had testified fully, even should it be conceded that were the circumstances otherwise the objection would have been well taken. But the admission of the evidence can be supported on other grounds. No recovery was sought to be had on the order. It was collateral merely. The plaintiff testified to the loan of money. The manner in which it was obtained for the defendant he describes as accomplished by means of an order on Clark. The order was not in his possession, for according to his testimony, he had given it to the defendant nearly twelve years before, and the defendant denied having it.

"In view, therefore, of the temporary nature of the order, the length of time since its use, the fact that it had long before accomplished its purpose and its collateral character, parol evidence characterizing the writing and stating the amount for which it was drawn was admissible. (*Grover v. Morris*, 73 N. Y. 479; *Chrysler v. Renois*, 43 id. 212; *Bowen v. Nat. Banks*, 11 Hun, 226; *M'Fadden v. Kingsbury*, 11 Wend. 668; *Jackson v. Root*, 18 Johns. 60.)

"The judgment should be affirmed."

H. W. McClellan for appellant.

Charles E. Patterson for respondent.

PARKER, J., reads for affirmance.

All concur, except LANDON, J., not sitting.

Judgment affirmed.

SAMUEL G. BROWN, Appellant, v. EMIL NEY et al., Respondents.

(Submitted January 21, 1892; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 5, 1890, which affirmed a judgment in favor of defendants, entered upon a verdict and affirmed an order denying a motion for a new trial.

Morris S. Wise for appellant.

Charles Strauss for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

WILLIAM M. VAN ANTWERP et al., Respondents, v. HENRY KELLY, as County Treasurer, etc., et al., Appellants.

(Argued January 22, 1892; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 8, 1888, which reversed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term and granted a new trial.

Myer Nusbaum for appellants.

James F. Cooper for respondents.

Agree to affirm and for judgment absolute against defendants ; no opinion.

All concur.

Order affirmed and judgment accordingly.

GEORGE SCHUCHMAN, Respondent, v. JOHN WINTERBOTTOM et al., Appellants.

(Argued January 22, 1892; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 5, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict.

Hays & Greenbaum for appellants.

John P. Schuchman for respondent.

Agree to affirm on opinion of General Term.

All concur.

Judgment affirmed.

700 MEMORANDA OF CAUSES NOT REPORTED.

JAMES N. DARRAH, Respondent, v. JAMES BOYS, Appellant.

(Argued January 25, 1892; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made at the May term, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

J. M. Ferguson for appellant.

A. B. Carrington for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

EMMA L. SHAW, Respondent, v. WINFIELD S. SHAW, Appellant.

(Argued January 25, 1892; decided February 9, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 13, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

E. H. Benn for appellant.

Abner C. Thomas for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

I N D E X .

ABATEMENT AND REVIVAL.

— *Where, in a foreclosure suit, an order was obtained for service of summons by publication on a non-resident defendant, and pending publication the plaintiff died, held, that to give the court jurisdiction, the publication should have been commenced de novo after substitution of personal representative of decedent as plaintiff.*

See Reilly v. Hart. 625

ACCOUNTING.

1. In an action for an accounting between partners one of the schedules of the account consisted of items claimed to have been paid by defendant for repairs to real estate purchased by the firm, but title to which was taken in the name of defendant. Defendant was asked if he paid the items in said schedule; this was excluded on plaintiff's objection. Previous to this it had been shown that the case had been tried partially before another referee, who died before the trial was completed; defendant testified that he had vouchers for the payments made by him which had been left with the former referee; that he had been informed by the person in charge of said referee's office that they had been transmitted to the new referee, and that the latter had not been able to find them. *Held*, that the evidence was competent and its exclusion error. *Van Bokkelen v. Berdell.* 141

2. An action in equity for an accounting between copartners is an appropriate, if not an exclusive, remedy to adjust and settle the partnership affairs. *Watts v. Adler.* 646

3. Although upon dissolution of a firm one of the copartners is alone authorized to liquidate the firm business, he may maintain an ac-

tion for an accounting and thereby compel a copartner to pay over any balance that may be established against him, or in case of deficiency in firm assets, to contribute his proportion of what is required to discharge the debts of the firm. *Id.*

ACTS OF CONGRESS.

Inasmuch as no penalty is imposed either upon the bank or the borrower by the National Banking Act (U. S. R. S. § 5201) for a violation of the provision thereof prohibiting a national bank from making any loan or discount on the security of the shares of its own capital stock, except as specified, such violation may not be urged against the validity of the transaction by anyone except the government; at least, unless the objection was raised before the contract was executed or while the security was in the hands of the bank. *Walden Nat. Bank v. Birch.* 221

ADMISSIONS AND DECLARATIONS.

In an action to recover damages for injuries to plaintiff's property abutting on a public street in New York city, the fee of which is in the city, arising from the building and maintaining of defendants' elevated road in said street, for the purpose of rebutting the presumption that plaintiff owned the easements in the street, defendants proved that before she acquired title said easements had been interfered with substantially to the same extent as when the action was brought. They also proved that proceedings had been instituted to acquire from plaintiff the right to maintain and operate the road in front of her premises, and the court found that in such proceedings

plaintiff had been duly served and brought into court, and that they were still pending. *Held*, that the defendants' evidence amounted to an admission that they occupied the street in subordination to plaintiff's right to compensation. *Hughes v. Met. E. R. Co.* 14

ADVERSE POSSESSION.

1. Where the owner of land, subject to an easement, claims to own it free from the easement, and excludes for twenty years the owner thereof, who acquiesces in the exclusion, the easement is lost by adverse possession. *Woodruff v. Paddock.* 618
2. So also an abutting owner's private rights in a street may be lost in case their existence is denied and they are exclusively possessed for more than twenty years by one claiming the fee of the street. *Id.*
3. In 1826 B., the owner of certain land in the city of R., laid it out into lots, and a map thereof was recorded; he sold and conveyed a lot, which in the deed was described by number, as designated on the map, which was referred to; this showed the lot as bounded on one side by an alley. The alley was used by the public until 1846, when such use was abandoned. C. became the owner of said lot in 1856; he was at the time the owner of the lot on the opposite side of the alley, and had since 1850 kept the same closed, had planted trees and erected a coal shed thereon. He continued in the actual, exclusive and notorious possession thereof, claiming to own it until his death in 1888. In 1860 C. conveyed the lot first mentioned by the description contained in the original deed. Plaintiff became the owner thereof in 1884. Defendant, in 1888, became the owner of part of the other lot, the description in his deed including the alley; he entered into possession and began the erection of a building thereon. In an action to restrain defendant from excluding plaintiff from using as a way the strip of land formerly the

alley, *held*, that while the grantee of B. of plaintiff's lot acquired a right of way in the alley, the easement had been lost by the non-user of plaintiff's predecessors, and by the adverse possession of C. and his successors. *Id.*

AGREEMENT.

See CONTRACT.

AMENDMENTS.

An action to foreclose a mechanic's lien was commenced in a County Court; the lien was for \$1,670.10. The complaint was amended on trial so as to demand only \$800. It was claimed by the owner that the court did not have jurisdiction. *Held*, that as there was nothing in the summons to show what the action was brought for, it being under the Code of Civil Procedure of the same form in all cases (§§ 416, 418), the court acquired jurisdiction when it was served, and had power to amend the complaint. *Van Clief v. Van Vechten.* 571

— *When amendment of complaint on trial before a referee a matter of discretion, and his denial of the motion not reviewable here.*

See Barnes v. Brown.

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APPEAL.

1. Upon the trial of an issue of fact by a referee or by the court without a jury, a refusal to make any finding whatever upon a question of fact, where a request to find is seasonably made by either party, or a finding without any evidence tending to sustain it, is a ruling upon a question of law (Code Civ. Pro. § 993), and when duly excepted to, serves as a notice to the respondent of an intention to raise on appeal a question of legal error and puts upon him the responsibility of adding by amendment of the case any omitted evidence on the question. *Van Bokkelen v. Berdell.* 141
2. Where, in an equity action, no objection is raised by answer or

upon trial that such an action is not the appropriate remedy, the objection is not available upon appeal. *B., S. & C. Co. v. D., L. & W. R. R. Co.* 152

3. An omission to find facts claimed by the unsuccessful party to a suit to be warranted by the evidence, can only be taken advantage of by an exception to a refusal to so find, upon request duly made as required by the Code of Civil Procedure (§§ 993, 1023); without this, this court cannot look into the evidence for facts to reverse the judgment. *Ostrander v. Hart.* 406

4. When the findings of a court are so inconsistent that they cannot be reconciled, those which are most favorable to the appellant are controlling upon the appellate court. *Traders' Nat. Bank v. Parker.* 415

5. This rule, however, applies only when the findings cannot by reasonable construction be reconciled; it is the duty of the court to reconcile them, if possible. *Id.*

6. An action to set aside as fraudulent an assignment for the benefit of creditors was brought by plaintiff on behalf of himself and other creditors who desired to join. Two attachment creditors whose claims were admitted by the inventory, were made defendants. They answered, admitting the allegations of the complaint as to fraud and joined with the plaintiff in the action. The judgment sustained the assignment and required said creditors to turn over the property attached to the assignee. *Held*, that said creditors had the right to appeal. *Roberts v. Victor.* 585

7. Where, in a proceeding, under the provision of the Judiciary Act (§ 25, chap. 280, Laws of 1847), as amended in 1880 (§ 1, chap. 354, Laws of 1880), in reference to the removal of justices of the peace, upon coming in of the report of the referee, the proceedings were dismissed, and upon application of both the complainant and respondent, the court certified and taxed the counsel fees and disbursements of both parties, *held*,

that the portion of the order making these allowances was reviewable here on appeal by the city wherein the justice resided. *In re King.* 602

8. Prior to the appeal all of the items taxed were paid by direction of the common council of the city, except the sum taxed as the fees and disbursements of complainant's counsel. The appeal was "from the whole and every part of said order certifying and taxing the expenses of the reference herein." *Held*, that the notice of appeal was too broad. The order appealed from, therefore, modified by striking out the item so unpaid, but without costs of appeal. *Id.*

— When question as to whether one sought to be charged as trustee of a manufacturing corporation because of failure to file annual report, is one of fact, and so not reviewable here.

See F. Nat. Bank v. Lamon. 366

— When amendment of complaint on trial before a referee a matter of discretion and his denial of the motion not reviewable here.

See Barnes v. Brown. 372

ASSESSMENT AND TAXATION.

1. Statutes providing the procedure for assessing and collecting taxes, for the sale of land for their non-payment, and for the redemption of lands sold for unpaid taxes, are applicable to infants and persons under disabilities, unless they are excepted from the operation of the act. *Lery v. Newman.* 11

2. The provision of the charter of the city of Brooklyn of 1873 (§ 9, tit. 8, chap. 863, Laws of 1873), providing that where lands sold for unpaid taxes belong to an infant having no guardian, no conveyance shall be executed by the registrar until at least one month after a guardian has been appointed or the disability removed, and until the expiration of the month authorizing the redemption, does not apply to the sale and redemption of land sold for taxes readjusted under the act of 1883 (Chap. 114, Laws of 1883), providing for

- the settlement and collection of arrearages of unpaid taxes in said city. *Id.*
3. Accordingly *held*, where an infant owner of land, sold in pursuance of the latter act, was served personally with notice of sale and failed to redeem within the time prescribed by the act, that the right of redemption and the title of the infant was cut off. *Id.*
4. Where, in an action to have an assessment for a local improvement upon plaintiff's land in the city of Buffalo adjudged illegal and to restrain its collection, it was not claimed that any land outside the district upon which the assessment was made should have been included, nor was any fraud upon the part of the assessors alleged, but the claim was, and it was found by the trial court, that the assessment upon plaintiff's land was largely in excess of its proportionate benefit, *held*, that the action was not maintainable; that while the facts might have entitled plaintiff to relief upon review by certiorari, as the matter was one within the jurisdiction of the assessors under the city charter (§§ 1, 2, 3, tit. 6, chap. 519, Laws of 1870), a mere error of judgment on their part furnished no support for collateral attack by action. *Hoffeld v. City of Buffalo.* 387
5. It was conceded on the trial and the court found that the assessors in making the assessments disregarded the value of buildings or other improvements upon the respective parcels of land assessed "for the reason that they determined that the amount of benefits was not affected by the improvements." *Held*, that this did not show that the assessors proceeded upon a wrong rule of law, but was simply a determination as to what property was in fact benefited, and the error, if any, was one of judgment. *Id.*
6. Where money has been collected under an assessment for a local improvement which is valid on the face of the record but is illegal by reason of the existence of some fact outside thereof, it may not be recovered back until the assessment is set aside. *Trimmer v. City of Rochester.* 401
7. It is not sufficient that in an action brought by another party whose property was assessed for the same improvement a judgment was recovered adjudging the assessment against his property to be illegal and void; this does not set aside all of the assessments, but only that against the property of the plaintiff in such action, and the other assessments are not affected or invalidated thereby. *Id.*

ASSIGNMENT.

1. Under the Mechanics' Lien Law of 1885 (Chap. 342, Laws of 1885), the filing of the prescribed notice originates the lien, and until this is done the laborer or material man has no preferential right to be paid out of the sum due the contractor from the owner of the building. If, before notice is filed, the contractor assigns to a creditor in payment of his debt, the whole or any portion of the moneys due or to become due to him on his contract, the assignor is entitled to the same in preference to the lienor. *Stevens v. Ogden.* 182
2. An order drawn by the contractor in favor of a creditor, by its terms payable out of a sum due or to become due from the owner under his contract, when such order is given and accepted in payment of the debt, it operates as an assignment *pro tanto* of that fund. *Id.*

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. Under the provision of the act of 1887 (§ 30, chap. 503, Laws of 1887), prohibiting preferences in a general assignment beyond a certain amount, whatever is done in connection with, or in contemplation of, the assignment, with intent to defeat the operation of the statute, is within the spirit of its prohibition. *Spelman v. Freedman.* 421

2. In an action brought by plaintiffs, as general creditors of defendant S., to set aside certain judgments confessed by her, together with executions issued thereon and levies made thereunder, as in violation of said act, the complaint alleged in substance that S., a few hours before she made an assignment, in contemplation thereof and for the purpose of giving preferences in fraud of the assignment, confessed the judgments in question; that immediately after the entry thereof executions were issued upon them, which, just before the delivery of the assignment, were levied upon all her property, and that the same was not worth three times the amount of the judgments; that said executions were issued and levies made in contemplation of the assignment, and for the purpose of preferring the judgment creditors, in fraud of the assignment; also that the assignee, upon being requested, had refused to bring suit to set aside the judgment. From the assignment and the judgment-rolls, copies of which were annexed to the complaint, it appeared that the debts for which the judgments were confessed were preferred in the assignment, they being the only preferences, except wages, etc., of the employes of the assignor. Upon demurrer to the complaint, defendants claimed that, as plaintiffs were not judgment creditors, they had no standing in court to maintain the action. *Held*, untenable, as plaintiffs were not seeking to attack the assignment, but, as beneficiaries of the trust, were seeking to uphold and enforce it; that such an action was maintainable by any creditor, whether a judgment creditor or a creditor at large. *Id.*
3. Defendants, the judgment creditors, also claimed the complaint to be insufficient, as it did not allege that they knew S. intended to make an assignment. *Held*, untenable, as the complaint alleged that the acts of the judgment creditors, *i. e.*, the issuing of executions and the levies thereunder, as well as the acts of their debtor, were in contemplation, and in fraud, of the assignment. *Id.*
4. The inventory or schedule required by the General Assignment Act (§ 3, chap. 466, Laws of 1877), to be made and filed by a debtor making an assignment, is to be read in connection with the assignment and as part of the transaction. *Roberts v. Victor.* 585
5. Where the assignor prefers a creditor for a specified amount, made up of several items of indebtedness which the assignee is directed to pay, and it appears that some of the items were either paid at the time of the assignment or that the indebtedness never existed, the assignment is, as matter of law, fraudulent and void as to creditors. *Id.*
6. Neither the assignee nor a creditor coming in under the assignment has power to question the validity of the items preferred, and whatever may have been in fact the motive of the assignor, he is presumed to have intended the consequences of his acts, and the effect of the preference is to defraud general creditors to the extent such preference is in excess of the amount in fact owing. *Id.*
7. Where, therefore, in an action to set aside such an assignment the referee, while finding the facts of the non-existence of certain items of preferred indebtedness, also found that the assignment was made in good faith, with no intent to hinder, delay or defraud creditors, *held*, that this did not remove the imputation of fraud or validate the assignment. *Id.*
8. An assignment contained among the preferences an alleged indebtedness to M. to the amount of "about \$12,000," besides interest upon "accounts and notes which the assignors are unable to describe." The assignment then gave the items, with dates for interest, closing with the statement, "as near as assignors are able to state," the whole indebtedness amounting to \$13,501.70. The assignors filed an inventory, which described the indebtedness to M. as \$12,000, accounts and notes, and then gave the items, as specified in the assignment, without

any qualifying words. The referee found that of the items specified, those amounting to \$7,500 were either paid or no such indebtedness existed, but that the assignors were indebted to M. in other items, making a total indebtedness, including interest, of \$12,656.38; that the assignment was made in good faith, with no intent to defraud, and as a conclusion therefrom that the preference was valid to the amount last specified. *Held*, error; that the inventory fixed specifically the amount of the indebtedness and the items preferred; but that assuming it was the indebtedness to M., not the particular items, which was preferred, and that a mistake in giving the items would not avoid the assignment, as the preference was to a substantial amount in excess of the actual indebtedness, the assignment was so far fraudulent, and this vitiated the whole instrument. *Id.*

9. The action was brought by plaintiff on behalf of himself and other creditors who desired to join. Two attachment creditors whose claims were admitted by the inventory, were made defendants. They answered, admitting the allegations of the complaint as to fraud and joined with the plaintiff in the action. The judgment sustained the assignment and required said creditors to turn over the property attached to the assignee. *Held*, that said creditors had the right to appeal. *Id.*

ASSOCIATIONS.

1. No person, corporation or association, authorized to acquire and hold property, can be divested of it by the fiat of any other organization, or in any way without its consent, unless by due process of law. *Wicks v. Monihan.* 232
2. An unincorporated association of seven or more members, organized as a local assembly of the organization known as "Knights of Labor," is not divested of title to property, contributed and owned by the associated members, by an annulment of its charter, and can-

not be deprived thereof by any decree of the General Assembly. *Id.*

3. After a local assembly is thus deprived of its charter, an action may be maintained by its president or treasurer to recover an indebtedness due the association. (Code Civ. Pro. § 1919.) *Id.*
4. The distinction between such a case and that where a member of a club or voluntary association, in which the rights of the individual members are fixed by contract, has been expelled for violation of rules, pointed out. *Id.*

ATTACHMENT.

1. Where property is sought to be attached under and in pursuance of the provisions of the Code of Civil Procedure (§ 649, subd. 3), declaring that property not capable of manual delivery may be attached by leaving with the person holding it, or if it consists of a demand other than a bond, promissory note, or other instrument for the payment of money, with the person against whom it exists, a certified copy of the warrant, with a notice showing the property attached, such person must look to the notice to ascertain what property is attached and base his action thereon. *Hayden v. National Bank.* 146
2. It is of no consequence what knowledge the person may have as to the particular property intended to be attached, unless such knowledge is derived from the notice, and unless there is a substantial compliance with the statute, title to the property is not divested and the holder thereof remains liable to the owner. *Id.*
3. In an action brought by plaintiffs to recover an amount due a firm upon a deposit account with defendant's bank, which plaintiffs claimed to have attached in an action against said firm, the sheriff in attempting to levy, delivered to defendant's cashier a copy of the warrant; this showed that the action was against the firm. Upon

it was indorsed a notice that by it the sheriff was commanded to attach all the property of L., one of the firm, within his county, and that by virtue thereof he attached any moneys due or belonging to L., or any of his property in its possession. *Held*, that the notice was insufficient to attach, and could not be made the foundation of a proceeding to divest the title of the firm to, any funds on deposit with defendant; that defendant could only look to the notice to ascertain the property levied on and was not bound to read the warrant with it; also, that the notice was insufficient to attach the interest of the partner named in the deposit, as it did not specify such an interest, and as the complaint in the attachment suit did not seek to recover on such ground.

Id.

4. The interest of a vendee, in possession of lands under a contract for the purchase thereof, upon which he has made partial payments, and, to a conveyance of which he is entitled on completing his payments, may be levied upon by virtue of an attachment duly issued in an action against him. (Code Civ. Pro. § 645.) *Higgins v. McConnell.* 482

AWARD.

1. To constitute a cause of action against a railroad company under the General Railroad Act (§ 18, chap. 140, Laws of 1850, as amended by chap. 198, Laws of 1876), to recover the amount of an award for land taken by it for railroad purposes, it is necessary that the final order confirming the award of the commissioners of appraisal, or a certified copy thereof, should be recorded in the county clerk's office. *Lent v. N. Y. & Mass. R. Co.* 504
2. An allegation, therefore, in the complaint in such an action of such recording is essential, so is also an averment that the defendant has failed to pay the award or is indebted to plaintiffs therefor. *Id.*

3. The complaint in such an action alleged the incorporation of defendant, the presentation by it of a petition for the appointment of commissioners, their appointment and report of amount to be paid plaintiff, the confirmation thereof on defendant's motion, and that defendant subsequently appealed from said order to the General Term, where it was affirmed. Then followed a prayer for judgment for the amount of the award and costs. There was no allegation that defendant had failed or omitted to pay the award or was indebted to plaintiff. Defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action, and the demurrer was overruled. *Held*, error. *Id.*

4. The complaint did not expressly allege that the order confirming the report of the commissioners had been recorded as required by said act to create a debt against defendant. It did allege, however, that the order had been "entered," and the paragraph closed with this clause: "To which order or its record plaintiffs beg leave to refer." *Held*, that the word "entered" was properly used as synonymous with "recorded;" and so, that the complaint in this respect was sufficient. *Id.*

5. In an action under the General Railroad Act (§ 18, chap. 140, Laws of 1850, as amended by chap. 95, Laws of 1890), to recover the amount of an award for land taken for railroad purposes, it appeared that defendant was the successor of the P. & E. R. R. Co., that the original order confirming the commissioners' report was delivered by the counsel for that company to the county clerk, and was copied at full length in a book indorsed P. & E. R. R. Co. orders, with the words "entered and recorded" at the end thereof. Defendant claimed that the order should have been recorded in the book of deeds, and that the recording of the original order, instead of a certified copy thereof, was not in compliance with the law. *Held*, untenable; that there was a substantial compliance with the statute, and defendant, having caused the order

to be recorded as it was, it would not be permitted to object. *Morgan v. N. Y. & Mass. R. Co.* 692

BANKS AND BANKING.

In an action brought by plaintiffs to recover an amount due a firm upon a deposit account with defendant's bank, which plaintiffs claimed to have attached in an action against said firm, the sheriff, in attempting to levy, delivered to defendant's cashier a copy of the warrant; this showed that the action was against the firm. Upon it was indorsed a notice that by it the sheriff was commanded to attach all the property of L., one of the firm, within his county, and that by virtue thereof he attached any moneys due or belonging to L., or any of his property in its possession. *Held*, that the notice was insufficient to attach, and could not be made the foundation of a proceeding to divest the title of the firm to, any funds on deposit with defendant; that defendant could only look to the notice to ascertain the property levied on and was not bound to read the warrant with it; also, that the notice was insufficient to attach the interest of the partner named in the deposit, as it did not specify such an interest, and as the complaint in the attachment suit did not seek to recover on such ground. *Hayden v. National Bank.* 146

See NATIONAL BANKS.

BEQUEST.

See WILLS.

BILLS, NOTES AND CHECKS.

1. Where, in an action upon a promissory note brought by a transferee, the maker establishes that the note was obtained from him through fraud, the burden rests upon plaintiff to establish that he is a *bona fide* purchaser. *Joy v. Defendorf.* 6
2. Where plaintiff seeks to establish this by his own testimony, although it is undisputed, the credi-

bility of his testimony is for the jury to determine, and so, a direction of a verdict in his favor is error. *Id.*

3. The rule which renders void as usurious a note in the hands of a third party who purchased it at a discount greater than the legal rate of interest, applies only to notes that had no inception between the parties thereto and which were not intended to be available until discounted. *Id.*
4. Where, therefore, a note was executed and delivered to the payee with intent to represent an existing obligation, it is valid in the hands of a *bona fide* purchaser at a discount greater than the legal rate of interest, although it was obtained by fraud from the maker. *Id.*

BONA FIDE HOLDER.

1. Where, in an action upon a promissory note brought by a transferee, the maker established that the note was obtained from him through fraud, the burden rests upon plaintiff to establish that he is a *bona fide* purchaser. *Joy v. Defendorf.* 6
2. Where, therefore, a note was executed and delivered to the payee with intent to represent an existing obligation, it is valid in the hands of a *bona fide* purchaser at a discount greater than the legal rate of interest, although it was obtained by fraud from the maker. *Id.*

BONA FIDE PURCHASER.

In 1878 S. executed and delivered to W. a conveyance of certain premises, absolute in form, but which were in fact intended by the parties as collateral security for advances made by W. to S. In 1882 W., at the request of S., conveyed said premises to plaintiff, who assumed a mortgage thereon and paid the balance of the purchase-price in cash, which was the full value of the premises, and S. received the benefit thereof. Plaintiff had no actual notice that the deeds to W. were intended as se-

curity only. The premises were at the time of the conveyance in the possession of S. through his tenants, and plaintiff failed to inquire of them as to the title under which they held. Possession was surrendered to plaintiff after her purchase, and she continued in possession thereafter. In an action to recover damages for injuries from the maintenance of an elevated railroad in front of said premises, and to restrain its future maintenance and operation, S. testified that the conveyance to plaintiff was made with his consent, and that his debt to W. had been paid. The court found that plaintiff has, since the conveyance to him, been seized of an estate of inheritance in fee simple absolute in said premises, and through his agents and servants been in possession of the same. *Held*, no error; that plaintiff's failure to make inquiry of the tenants did not, under the circumstances, affect his position as *bona fide* purchaser; that the general rule that possession is notice to the person proposing to purchase of the rights of the occupant did not apply; also, that S. was estopped from asserting or maintaining any claim to the title, or right to redeem. *Minton v. N. Y. E. R. R. Co.* 332

BOND.

1. In an action upon a bond given by one R. to plaintiff, a national bank, conditioned for the faithful performance by R. of his duties as plaintiff's cashier, these facts appeared: One T., who owned certain shares of plaintiff's stock and who was indebted to it, desiring to have his notes discounted to apply upon such indebtedness, under an arrangement made with R., as cashier, and for the purpose of securing the notes, and to avoid said prohibition, assigned his stock to R. individually, and the same was transferred to the latter on the books of the bank. The notes were thereupon indorsed by R., discounted by plaintiff and the proceeds applied in payment of T.'s indebtedness. The certificates of the stock were thereafter held by the bank, the dividends

thereon being applied to pay the interest on the notes. Subsequently R. assigned the certificates to other banks as collateral security for loans made to him, which not having been paid, the collaterals were sold and R.'s indebtedness paid out of the proceeds. The notes so discounted by plaintiff were not paid. *Held*, that conceding the transaction was in violation of the said act, defendants could not avail themselves thereof as a defense; that R. took and held the stock in trust for the bank, and it was the equitable owner thereof, subject to the right of T. to redeem it; and that the transfer thereof by R. was a violation of his duty, and so, a breach of the condition of the bond. *Walden Nat. Bank v. Birch.* 221

2. The bank brought action and recovered judgment on the notes against R., as indorser. *Held*, that this was not a waiver of the right to sue him in tort for the misappropriation, and so, was not a waiver of the right to sue the sureties for the damages caused thereby; that the two remedies were not inconsistent, but concurrent. *Id.*

BOUNDARIES.

1. *It seems* that where, in the description of premises in a deed, courses, distances and monuments are given, the premises must be located according to the deed, and all parol evidence of the declarations and acts of the parties to the effect that a different location was intended is inadmissible, as contradicting or varying the deed; but where the description is so vague, obscure or conflicting as to leave the intent of the parties uncertain, their declarations and acts may be proven to determine the intent. *Harris v. Oakley.* 1
2. H., was the owner of certain premises divided into two parts by a fence; on the north part was a hotel and outbuildings, the south part was used as a garden; he executed a conveyance to defendant, the description including the whole premises, "excepting and reserv-

ing therefrom 137 feet front and rear, measuring from George Harrison's north line, * * * being the piece of land occupied as a garden." H. thereafter conveyed to plaintiffs the portion not conveyed to defendant. The fence was 137 feet north of Harrison's line at the front end, but in the rear 137 feet extends nineteen and one-half feet north of the fence, and a line run from this point to the front parallel with Harrison's line would run diagonally through a barn or outhouse on the hotel premises. In an action of ejectment to recover possession of the triangular strip north of the fence, the court found that H., at the time of the conveyance to defendant, put him in possession of this strip, and that the same was in defendant's possession at the time of the conveyance to plaintiff. *Held*, that a judgment in favor of plaintiff was error; that as there were two conflicting descriptions of the land reserved in defendant's deed the declarations and acts of the parties were proper to be considered for the purpose of showing their intent; and that putting defendant in possession of all the land north of the fence was a practical location of the line and disclosed the intent to be simply to except the garden lot. *Id.*

BROOKLYN (CITY OF).

1. The provision of the charter of the city of Brooklyn of 1873 (§ 9, tit. 8, chap. 863, Laws of 1873), providing that where lands sold for unpaid taxes belong to an infant having no guardian, no conveyance shall be executed by the registrar until at least one month after a guardian has been appointed or the disability removed, and until the expiration of the month authorizing the redemption, does not apply to the sale and redemption of land sold for taxes readjusted under the act (Chap. 114, Laws of 1883) providing for the settlement and collection of arrearages of unpaid taxes in said city. *Lery v. Newman*. 11

2. Where an infant owner of land, sold in pursuance of the latter act,

was served personally with notice of sale and failed to redeem within the time prescribed by the act, *held*, that the right of redemption and the title of the infant was cut off. *Id.*

BUFFALO (CITY OF).

1. Where, in an action to have an assessment for a local improvement upon plaintiff's land in the city of Buffalo adjudged illegal and to restrain its collection, it was not claimed that any land outside the district upon which the assessment was made should have been included, nor was any fraud upon the part of the assessors alleged, but the claim was, and it was found by the trial court, that the assessment upon plaintiff's land was largely in excess of its proportionate benefit, *held*, that the action was not maintainable; that while the facts might have entitled plaintiff to relief upon review by certiorari, as the matter was one within the jurisdiction of the assessors under the city charter (§§ 1, 2, 3, tit. 6, chap. 519, Laws of 1870), a mere error of judgment on their part furnished no support for collateral attack by action. *Hoffeld v. City of Buffalo*. 387

BURDEN OF PROOF.

1. Where, in an action upon a promissory note brought by a transferee, the maker establishes that the note was obtained from him through fraud, the burden rests upon plaintiff to establish that he is a *bona fide* purchaser. *Joy v. Defendorf*. 6

2. *It seems*, in order to recover damages for false representations, fraud must be proved and cannot be presumed; the representations must be shown to have been made with a knowledge that they were false and untrue, and for the purpose of deceiving the plaintiff, and that they had that effect. *Pryor v. Foster*. 171

3. While to entitle a principal to recover money wrongfully paid by his agent upon a debt of the latter,

he must show that the creditor knew that the agent was acting in violation of his authority, knowledge that the money was held by him as agent is sufficient to establish this *prima facie*, as the legal presumption is that an agent has no authority to dispose of the property of his principal in payment of his own debt. *Gerard v. McCormick*. 261

4. One, therefore, who receives such payment, with knowledge that the money was held by his debtor as agent, does so at his peril, and to defeat a recovery must show authority in the agent to so dispose of the money. *Id.*

CASE.

Upon the trial of an issue of fact by a referee or by the court without a jury, a refusal to make any finding whatever upon a question of fact, where a request to find is seasonably made by either party, or a finding without any evidence tending to sustain it, is a ruling upon a question of law (Code Civ. Pro. § 993); and when duly excepted to, serves as a notice to the respondent of an intention to raise on appeal a question of legal error and puts upon him the responsibility of adding by amendment to the case any omitted evidence on the question. *Van Bokkelen v. Berdell*. 141

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CAUSE OF ACTION.

1. One who interferes with another's right to the service of a third person, whether male or female, a minor or adult, is liable for actual or compensatory damages, in the same manner and upon the same grounds that he would be liable for an unlawful interference with any other property right of another. *Lawyer v. Fritcher*. 239

2. Where, in an action to have an assessment for a local improvement upon plaintiff's land in the city of Buffalo adjudged illegal and to restrain its collection, it was not claimed that any land outside the district upon which the assessment was made should have been included, nor was any fraud upon the part of the assessors alleged, but the claim, was, and it was found by the trial court, that the assessment upon plaintiff's land was largely in excess of its proportionate benefit, *held*, that the action was not maintainable; that while the facts might have entitled plaintiff to relief upon review by certiorari, as the matter was one within the jurisdiction of the assessors under the city charter (§§ 1, 2, 3, tit. 6, chap. 519, Laws of 1870), a mere error of judgment on their part furnished no support for collateral attack by action. *Hoffeld v. City of Buffalo*. 387

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3. An action is maintainable at the suit of a taxpayer, against city officials, restraining them from entering into a contract of employment, in a position where a civil service examination is required, with one who has not passed the examination, or to restrain the payment of the salary of such an employe out of the funds of the city. (Code Civ. Pro. § 1925; chap. 673, Laws of 1887.) *Peck v. Belknap*. 394

4. Where money has been collected under an assessment for a local improvement which is valid on the face of the record but illegal by reason of the existence of some fact outside thereof, it may not be recovered back until the assessment is set aside. *Trimmer v. City of Rochester*. 401

5. It is not sufficient that in an action brought by another party whose property was assessed for the same improvement a judgment was recovered adjudging the assessment against his property to be illegal and void; this does not set aside all of the assessments, but only that against the property of the plaintiff in such action, and the other assessments are not affected or invalidated thereby. *Id.*

6. To constitute a cause of action against a railroad company under the General Railroad Act (§ 18, chap. 140, Laws of 1850, as amended by chap. 198, Laws of 1876), to recover the amount of an award for land taken by it for railroad purposes, it is necessary that the final order confirming the award of the commissioners of appraisal, or a certified copy thereof, should be recorded in the county clerk's office. *Lent v. N. Y. & Mass. R. Co.* 504

CERTIFICATE.

1. *It seems* that under the provisions of the act of 1842 (Chap. 306, Laws of 1842), requiring the secretary of state when an act as published in the session laws is certified "as having been passed by the assent of two-thirds of the members

elected to each house" to state in connection with it as published in the session laws that it was passed "by a two-thirds vote" and that this statement shall be presumptive evidence that the bill was certified as having been so passed, the presumption thus created may be overcome by the production of the original certificate showing it was not so passed. *Rumsey v. N. Y. & N. E. R. R. Co.* 88

2. But while under the Revised Statutes (1 R. S. 156, § 3), no act shall be deemed to have been passed by a two-thirds vote unless so certified by the presiding officer of each house, a defective certificate which fails to state either way, *i. e.*, as to whether or not the act was passed by a two-thirds vote, is not conclusive to overcome the presumption created by the statement of the secretary in the session laws. *Id.*
3. In such case the journal of the house whose presiding officer has made the defective certificate may be resorted to for the purpose of determining the fact. *Id.*

CIVIL SERVICE.

1. A disqualification, under the Civil Service Law, for an appointment in the public service of a city, applies not only to the individual who has not passed the requisite examination, but also to the city itself; it cannot employ, or receive into its service, a person not eligible under the law. *Peck v. Belknap.* 394
2. An action is maintainable, at the suit of a taxpayer, against city officials, restraining them from entering into a contract of employment, in a position where a civil service examination is required, with one who has not passed the examination, or to restrain the payment of the salary of such an employe out of the funds of the city. (Code Civ. Pro. § 1925; chap. 673, Laws of 1887.) *Id.*
3. It is not a defense to such an action that an employment by the city of some person for the purpose specified is proper and lawful,

and that the compensation agreed to be paid was not extravagant. *Id.*

4. Where an appointment is to a position covered by the regulations for admission into the service of the city by its mayor, and approved by the civil service commission, the relation to the city of the appointee cannot be changed into that of an independent contractor by the execution of a formal contract between them, setting forth the specific duties he is to perform. *Id.*
5. The common council of the city of Rochester, by resolution, authorized the employment of some person to keep a book containing a record of the street lamps in the city, and showing the number each day not lighted as reported to him by the policemen of that city. B. was so employed for a period, stated, at a specified salary, and he entered upon the discharge of his duties. The common council, by another resolution, directed the mayor to enter into a contract with B. for the performance by him, at a compensation stated, of the duties specified in the prior resolution, and in addition "to perform such other duties as may be connected with the public street lighting system of the city as may be required" and to furnish "written reports upon any of the subjects aforesaid." The regulations for the admission of persons into the service of the city, after certain exceptions, classified the service as follows: "Schedule B (Part one). All officers and members of the Police and Fire Department. (Part two.) All other subordinate officers and assistants." Appointments in part two were required to be made from persons whose names were certified by the board of examiners. B. had never been examined, nor was his name certified by that board. *Held*, that B., under both resolutions, was an assistant to the lamp committee, with duties merely clerical, and so, his employment fell within part two, and his admission into the city service was illegal; that any payments made to him by the city officials would be a waste of the

city funds, and, therefore, that an action was maintainable, at the suit of a taxpayer, to restrain such payment. *Id.*

CODES.

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CODE OF CIVIL PROCEDURE.
PENAL CODE.

CODE OF PROCEDURE.

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§ 1919. *Wicks v. Monihan.* 232
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COMMISSIONERS OF LAND OFFICE.

1. The act of 1850 (Chap. 283, Laws of 1850), which empowers the commissioners of the land office to grant to the proprietors of adjacent lands "so much of the lands under the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this state or proper for the purpose of beneficial enjoyment of the same by the adjacent owner" is one requiring the assent of two-thirds of both houses of the legislature. (State Const. art. 1, § 9; 1 R. S. 156, § 2.) *Rumsey v. N. Y. & N. E. R. R. Co.* 88
2. The legislature had authority to confer such power upon the said commissioners. (Const. art. 5, §§ 5, 6.) *Id.*

COMMON SCHOOLS.

1. Under the provision of the act consolidating the acts in reference to public instruction (§ 19, chap. 555, Laws of 1864, as amended by chap. 567, Laws of 1875, and chap. 528, Laws of 1881), which provides that "whenever a majority of all the inhabitants of any school district entitled to vote, to be ascertained by taking and recording the ayes and noes of such inhabitants attending" a school meeting, shall determine that a sum required for building a new school-house shall be raised by installments, the same may be so raised, and authorizes the trustees of the district to borrow so much of the sum voted as may be necessary, and to issue bonds therefor, a majority of the qualified voters of the district is not required, nor is a majority of those at a school meeting; the statute simply requires a majority of the qualified voters in attendance, pursuant to legal notice, who actually vote upon the question by answering "aye" or "no" as the names of all present are called. *Smith v. Proctor.* 319
2. Where, therefore, it appeared that the number of qualified voters in a school district was three hundred, that at a school meeting, of which due notice had been given, which was attended by one hundred and fifteen of such voters, a resolution authorizing the raising of a sum to be expended in building a new school-house, and directing the trustees to issue district bonds to the amount specified, payable in installments, was adopted by a vote of thirty-four ayes to thirty-three noes, the other voters present not voting, *held*, that the resolution was legally adopted; and so, that an action to restrain the issuing of the bonds or the collection of a tax to pay interest thereon was not maintainable. *Id.*

COMPROMISE.

In an action upon a disputed claim it is not competent for plaintiff to prove an offer to compromise by paying a specified sum, made by defendant for the purpose of pro-

curing a settlement of the controversy. *Smith v. Satterlee*. 677

CONSIDERATION.

An agreement by a creditor to withhold suit against his debtor is a good consideration to support a promise by a third party to pay the debt, although no fixed and definite time of extension is expressly agreed upon. *Traders' Nat. Bank v. Parker*. 415

CONSPIRACY.

—Where in action for conversion of personal property a conspiracy is charged, this is not necessarily a controlling element and does not require a verdict for or against all the defendants jointly. See *Lockwood v. Bartlett*. 340

CONSTITUTION.

No person, corporation or association, authorized to acquire and hold property, can be divested of it by the fiat of any other organization, or in any way without its consent, unless by due process of law. *Wicks v. Monihan*. 232

CONSTITUTIONAL LAW.

1. The act of 1850 (Chap. 283, Laws of 1850), which empowers the commissioners of the land office to grant to the proprietors of adjacent lands "so much of the lands under the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this state or proper for the purpose of beneficial enjoyment of the same by the adjacent owner" is one requiring the assent of two-thirds of the members of both houses of the legislature. (State Const. art. 1, § 9; 1 R. S. 156, § 2.) *Rumsey v. N. Y. & N. E. R. R. Co.* 88
2. The legislature had authority to confer such power upon the said commissioners. (Const. art. 5, §§ 5, 6.) *Id.*
3. The owners of lots abutting on a city street have, although the fee

thereof is in the municipality, certain rights and privileges therein, in the nature of easements, which constitute property, and of which they may not be deprived without just compensation. (State Const. art. 1, § 6.) *Egerer v. N. Y. C. & H. R. R. Co.* 108

4. While, therefore, the legislature may direct the closing of a street and may empower the municipality to discontinue its use as such, this power is subject to the constitutional prohibition, and it may not be exercised so as to deprive an abutting owner of the access to his premises furnished by the street, without making compensation; at least unless there is provided or left for him other means of access. *Id.*
5. The legislature may vest a private person or corporation with the right of eminent domain, when the use to be made thereof is to acquire property for the public benefit. *Pocantico W. W. Co. v. Bird*. 249
6. It seems the legislature has power to discriminate between residents and non-residents in favor of the former, in regard to its waters, the common property of the people of the state. *People v. Loundes*. 455

CONSTRUCTION.

While, in the construction of a will, the court must so construe its provisions as to effectuate the general intent of the testator as expressed in the whole instrument, and while for this purpose words and phrases may be transposed and its provisions read in an order different from that in which they appear in the instrument, and provisions may be inserted or left out if necessary, this can only be done in aid of the testator's intent and purpose, and not to devise a new scheme or to make a new will. *Tilden v. Green*. 29

CONTRACT.

1. In an action to recover for services rendered, the following facts

appeared: Defendant entered into a contract with the city of New York to construct certain sewers. Under said contract the city was authorized to retain, for six months after the work was done, a certain percentage of the contract price for the purpose of repairing the streets through which the sewers were constructed, which the city was authorized to expend only after defendant had, after being notified, refused to make such repairs. Defendant employed H., plaintiff's assignor, to superintend the work, agreeing to pay him for his services one-third of the net profits. The city made payments as the work progressed, and after its completion retained the percentage specified, which was paid to defendant in June, 1888. This action was commenced in January of that year. H. testified that he knew of the terms of defendant's contract with the city. Defendant moved to dismiss the complaint, at the close of plaintiff's evidence, on the ground that the action had been commenced before the contract was completed and before H.'s interest in the profits had become due. This motion was denied. *Held*, no error; that conceding it was not in the contemplation of the parties that the percentage of H. should become due and payable until the amount thereof could be ascertained, as the city was only authorized to expend for repairs the money retained, and the contractor could not be made liable for a larger sum, upon conclusion of the work, and upon payment of the amount earned less the amount retained, the parties could have determined the net profits and divided the same, leaving their interest, if any, in the amount retained, to be ascertained upon expiration of the six months. *Jenkins v. Dean*. 275

2. Defendants entered into a contract in writing with plaintiff to furnish him a hall in the city of B. for four performances of a theatrical company, plaintiff to receive fifty per cent of the gross receipts. Plaintiff thereafter wrote to defendants inclosing a contract for them to sign, by the terms of

which he was to receive sixty per cent of the gross receipts, and stated in his letter that he could not think of playing for less. Defendants returned said contract unsigned, with a letter stating that they already had a contract signed by plaintiff, and did not need any other. Defendants subsequently, having received from plaintiff's agent for publication certain advertisements, wrote said agent expressing surprise, and stating they had supposed from plaintiff's letter that the company was not coming to B., and that they could not arrange for the performances on the dates named. This letter was not received by said agent until his arrival at B. to make arrangements for said performances, to which place the letter had been forwarded. Plaintiff with his company came to B. in due time to perform his contract, but was refused the use of the hall. In an action upon the contract, the court refused to direct a verdict for defendants, but submitted to the jury the question as to whether defendants were relieved from the obligation of their contract. *Held*, no error; that defendants' letter, in response to that of plaintiff inclosing the proposed new contract, was an election on their part to keep the executed contract in force, which operated upon the rights of both parties, and so the contract was kept alive until the time of the performance. *Bernstein v. Meech*. 854.

3. Also *held*, that while the amount of profits plaintiff would have realized had the contract been performed, were not susceptible of proof, and so not recoverable, plaintiff was entitled to recover the amount of expenses legitimately and necessarily incurred by him for the purposes of the performance of the contract on his part; that it could not be assumed plaintiff would have lost any part of these expenditures had he been permitted to perform. *Id.*
4. Upon the death of one of two joint contractors, the primary liability for a breach of the contract rests upon the survivor, and in order to maintain an action against

him and the personal representatives of the decedent jointly, the complaint must allege that the latter is insolvent or unable to pay. *Barnes v. Brown.* 372

5. Plaintiff entered into a contract with B. & S. by which the latter, for a valuable consideration, agreed, among other things, to assign to plaintiff 2,000 shares of the capital stock of a certain corporation, said stock "to be full paid stock." B. & S. transferred to plaintiff certificates for the specified number of shares, but it was not full paid stock. On discovery of this, plaintiff tendered back the certificate and demanded full paid stock, which was refused. In an action to recover damages for breach of the contract, it appeared and the referee found that the stock had no actual or market value at the time when B. & S. undertook to deliver. *Held*, that plaintiff was only entitled to recover nominal damages; that it was immaterial that defendants, in order to perform the contract, would have been compelled to pay par for the stock, as plaintiff was simply entitled to recover a sum which would indemnify him for the loss he had suffered by the default. *Id.*

6. An agreement by a creditor to withhold suit against his debtor is a good consideration to support a promise by a third party to pay the debt, although no fixed and definite time of extension is expressly agreed upon. *Traders' N. Bank v. Parker.* 415

7. The legal effect of such an agreement is to bind the creditor to withhold suit for a reasonable time, and what is a reasonable time is a mixed question of law and fact, depending for its solution upon the circumstances of the case. *Id.*

8. Plaintiff held a note against H. & J., and threatened to bring suit thereon. Defendant, a creditor of H., who was financially embarrassed, requested plaintiff to delay prosecution. Plaintiff offered to extend the time for the payment of the note if defendant would

sign it. This he did. No time of extension was agreed upon. It was understood that defendant was at the time intending to attend a sale of certain property of H. under a chattel mortgage, from which it was hoped something might be realized, to be applied in payment of the note. In an action upon the contract so made by defendant, *held*, that it was founded upon a good consideration; that plaintiff waived his right to sue until after such sale. *Id.*

9. The A. & P. Telegraph Co. organized a department for the purpose of supplying newspapers with news transmitted by its wires; this department was entitled "The National Associated Press, James H. Goodsell, President." Subsequently, said Goodsell, the plaintiff herein, entered into a contract with said company, he contracting, in the name so given to the department, to furnish news to be transmitted by it at prices named. Thereafter, said company assigned and transferred to defendant all of its property, business, rights and privileges, etc., the latter undertaking and assuming performance of the contract in question. *Held*, that plaintiff could maintain an action in his own name for a breach of the contract; that as the contracting company was not defrauded or misled by the use of the name adopted by plaintiff, neither it nor its assignee could avoid the contract because of such use. *Goodsell v. W. U. Tel. Co.* 430

10. By the contract, plaintiff was to pay a certain sum per month, the telegraph company to transmit a certain number of words daily; for any excess plaintiff was to pay a rate specified for each word. The contract provided for the transmission of news over five circuits, one named the "far western." Subsequently an arrangement was made under which plaintiff paid for two operators at Pittsburg to repeat dispatches to towns included in the far western circuit. The amount paid for the two operators was more than the charges under the contract for ex-

cess of words. *Held*, a finding was proper that this arrangement took the place of the far western circuit, and that consequently defendant was not entitled to charge for the excess of words sent over that circuit. *Id.*

11. The contract provided that of the specified number of words for the regular reports, one-third should be sent in the day-time and two-thirds at night; that if the telegraph company should transmit news reports to any greater number of places than thirty-eight which were enumerated, it should receive for the excess over and above the monthly payment, a certain rate per word, and in case any one of the places named should cease to take the news service, and if no other place was substituted, the company would make a rebate from the monthly payments. All of the places named did not take the reports, and only fifteen or sixteen took them day and night. The reports were sent to other places not named, but at no time were there thirty-eight which received the day reports or the night reports. *Held*, that plaintiff was entitled to have both the day and night reports transmitted to thirty-eight places for the regular monthly charge, and it was not requisite that they should be sent to the same places, but that the night reports might be sent to different places from those receiving the day reports. *Id.*

12. In March, 1882, defendant's president wrote to plaintiff that it would no longer transmit the news reports at the contract prices, but would from that date charge an increased rate as stated, and unless this was paid that the service would be discontinued. Plaintiff declined to pay the increased rate and insisted upon the performance of the contract. In reply, said president stated that his company repudiated the contract; he gave plaintiff time to communicate with his customers; being unable to make any arrangements with them to pay the increased price, he so notified defendant on June 20, 1882, stating that he did not waive his claims under the con-

tract, but was willing to carry it out, and demanded performance by defendant. On June 24, plaintiff stopped delivery of his reports. *Held*, that plaintiff was entitled to recover damages for breach of the contract on defendant's part; that, as it had unqualifiedly repudiated the contract, only giving plaintiff time to communicate with his customers, when he failed to make new terms with them and so notified defendant, the extension of time was at an end, the contract was to be considered as abandoned by defendant, and plaintiff was justified in so treating it by stopping his reports. *Id.*

13. A party to a contract, containing a provision that it shall not be modified or changed, except by a writing signed by him, may by conduct estop himself from enforcing the provision against a party who has acted in reliance upon such conduct. He may also be estopped by the acts of an agent who possesses, or whom he has held out to possess, his power in respect to the provision. *Bishop v. Agricultural Ins. Co.* 488

14. The provision of the act in relation to married women (Chap. 90, Laws of 1860, as amended by chap. 172, Laws of 1862), making the property a married woman "acquires by her trade, business, labor or services, carried on or performed on her sole and separate account," her separate property does not apply to labor performed by her for her husband, and she cannot make a binding contract with him for her services having no connection with a separate business and estate, although the same are to be rendered outside of her household duties. While he cannot require her to perform services for him outside of the household, such services as she does render, whether within or without the strict line of her duty, belong to him, and a promise to pay therefor is simply a promise to make her a gift, and so is not enforceable. *Blaehinska v. H. M. & Home.* 497

15. Plaintiff proposed, in writing, to furnish defendants' steamers,

which were making regular trips during the year between certain ports, with coal at a price named for the year 1888, the quantity not being specified; the proposal was accepted. Coal was delivered as needed until June twenty-fifth, when defendants sold and ceased to operate their steamers, and declined to receive coal thereafter. The purchaser continued to make regular trips with the steamers as before. In an action to recover damages for breach of the contract, *held*, that it was for the delivery of all the coal required for the operation of the steamers during the entire year, and not a contract for successive deliveries of coal to be made only when the defendants should give plaintiff notice that a delivery was required; that the fact that defendants sold the steamers was immaterial, as this did not operate to relieve them from the obligation to take the coal required in the ordinary and accustomed use of the steamers; and so, that plaintiff was entitled to recover. *Wells v. Alexandre*.

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See MECHANIC'S LAEN.
INSURANCE CORPORATIONS.
INSURANCE (FIRE).
INSURANCE (LIFE).
INSURANCE (MARINE).

CONVERSION.

— *Where in action for conversion of personal property a conspiracy is charged, this is not necessarily a controlling element and does not require a verdict for or against all the defendants jointly.*

See Lockwood v. Bartlett. . 340

CORPORATIONS.

See INSURANCE CORPORATIONS.
INSURANCE (FIRE).
INSURANCE (LIFE).
INSURANCE (MARINE).
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.
WATER-WORKS COMPANIES.

COSTS.

1. Under the provision of the Judiciary Act (§ 25, chap. 280, Laws of

1847), as amended in 1880 (§ 1, chap. 354, Laws of 1880), in reference to the removal of justices of the peace, etc., which gives the court power in a proceeding for that purpose to certify and tax certain "reasonable expenses," the same to "be a charge against the city, town or village within which such justice of the peace," etc., resides, the court has no power, at least in a proceeding instituted after the passage of the amendatory act, to certify and tax counsel fees and disbursements; the power of the court is limited to an allowance of "the reasonable expenses of the referee." *In re King*. 602

2. Where, in such a proceeding, upon coming in of the report of the referee, the proceedings were dismissed, and upon application of both the complainant and respondent, the court certified and taxed the counsel fees and disbursements of both parties, *held*, that the portion of the order making these allowances was reviewable here on appeal by the city wherein the justice resided. *Id.*
3. Prior to the appeal all of the items taxed were paid by direction of the common council of the city, except the sum taxed as the fees and disbursements of complainant's counsel. The appeal was "from the whole and every part of said order certifying and taxing the expenses of the reference herein." *Held*, that the notice of appeal was too broad. The order appealed from, therefore, modified by striking out the item so unpaid, but without costs of appeal. *Id.*

COUNTER-CLAIM.

1. A policy of marine insurance was issued to a firm "for account of whom it may concern." The ship was at the date of the policy owned by R., one of the firm. The insurance was effected for the benefit of plaintiff, a creditor of R. and a mortgagee of the ship. Defendant set up as a counter-claim certain notes made or indorsed by the firm. *Held*, that

there was no legal basis for the counter-claim. *Reck v. Phoenix Ins. Co.* 160

2. Upon proof that all the debts of his testator have been paid, an executor, who is sole legatee, may avail himself of a chose in action belonging to the estate, as a counter-claim in an action against him. *Blood v. Kane.* 514

3. In an action by an undertaker to recover articles furnished and services performed in the burial of defendant's testator, defendant set up as a counter-claim an indebtedness of plaintiff to her testator, which was greater than the amount in suit, and asked for judgment for the excess. Defendant was the sole legatee and devisee under, and executrix of, the will. It was admitted that no notice to creditors to present claims had been published. Defendant testified that her testator owed very few debts when he died, and that she had paid those debts. She then offered to prove the counter-claim. The evidence was rejected, the referee ruling that the testator's claim was not available as a counter-claim or set-off. *Held* (BRADLEY and PARKER, JJ., dissenting), error; that defendant was entitled to show, by common-law evidence, that all the testator's debts had been paid, and having established that fact, was entitled to have the amount of plaintiff's indebtedness allowed as a counter-claim. *Id.*

COUNTY COURT.

An action to foreclose a mechanic's lien was commenced in a County Court; the lien was for \$1,670.10. The complaint was amended on trial so as to demand only \$800. It was claimed by the owner that the court did not have jurisdiction. *Held*, that as there was nothing in the summons to show what the action was brought for, it being under the Code of Civil Procedure of the same form in all cases (§§ 416, 418), the court acquired jurisdiction when it was served and had power to amend the complaint. *Van Olief v. Van Vechten.* 571

SICKELS — VOL. LXXXV.

COVENANTS.

One C. being the owner of certain premises upon which was a lane or drive-way sixteen feet in width, running east from a street, upon the south side of which lane was a store with a hatch-way, giving access to the cellar which projected into the lane about five feet, sold and conveyed by full covenant deed to B., "his heirs and assigns," that portion of the premises north of the lane, "also a right of way the whole length of the south line" of the premises conveyed, "between said south line and a line drawn parallel with the north side of the store * * * to be used by the grantee in common with the grantor, said lane not to be encumbered or built upon by either party." C. subsequently sold and conveyed the remaining portion of said premises, reserving the right of way between the store and B.'s south line, to be used mutually by the grantee and B., "their heirs or assigns respectively." Defendant having acquired title to the south portion, erected a building thereon which occupied over four feet of the lane. In an action brought by plaintiff, who had acquired title to the north portion, to compel the removal of that part of the building which encroached upon the way, *held*, that the covenant that the lane "was not to be encumbered or built upon by either party," was one running with the land; that the words "either party," were not used in a restrictive sense, but as including all persons whom the party undertook to represent and bind with himself, that is "his heirs, executors, administrators and assigns;" and that, therefore, plaintiff was entitled to the relief sought. *Dexter v. Beard.* 549

CREDITOR'S SUIT.

1. In an action brought by plaintiffs, as general creditors of defendant S., to set aside certain judgments confessed by her, together with executions issued thereon and levies made thereunder, as in violation of said act, the complaint alleged in substance that S., a few

hours before she made an assignment, in contemplation thereof and for the purpose of giving preferences in fraud of the assignment, confessed the judgments in question; that immediately after the entry thereof executions were issued upon them, which, just before the delivery of the assignment, were levied upon all her property, and that the same was not worth three times the amount of the judgments; that said executions were issued and levies made in contemplation of the assignment, and for the purpose of preferring the judgment creditors, in fraud of the assignment; also that the assignee, upon being requested, had refused to bring suit to set aside the judgment. From the assignment and the judgment-rolls, copies of which were annexed to the complaint, it appeared that the debts for which the judgments were confessed were preferred in the assignment, they being the only preferences, except wages, etc., of the employes of the assignor. Upon demurrer to the complaint, defendants claimed that, as plaintiffs were not judgment creditors, they had no standing in court to maintain the action. *Held*, untenable, as plaintiffs were not seeking to attack the assignment, but as beneficiaries of the trust, were seeking to uphold and enforce it; that such an action was maintainable by any creditor, whether a judgment creditor or a creditor at large. *Spelman v. Freedman*. 421

2. Defendants, the judgment creditors, also claimed the complaint to be insufficient, as it did not allege that they knew S. intended to make an assignment. *Held*, untenable, as the complaint alleged that the acts of the judgment creditors, i. e., the issuing of executions and the levies thereunder, as well as the acts of their debtor, were in contemplation, and in fraud, of the assignment. *Id.*

CUSTOM.

In an action by a stock broker who held collateral security for the

stock transactions of a customer to recover a balance found due him on closing up the transactions, it appeared that plaintiff sold out the stock purchased and carried for defendant, pursuant to his order. Defendant offered to prove that it was the custom of stock brokers, where collateral was put up as a margin, and the account became sufficiently reduced to jeopardize it, to advertise and sell the collateral and charge his customer with the balance, and that this custom was known to plaintiff at the time the margin was put up and the account closed. This was excluded on objection. *Held*, no error; that whatever the custom of brokers might be while a speculation was pending, it had no application to a broker's right to recover what is due him after he has carried his customer's stock as long as requested, and finally sold pursuant to an express order. *De Cordova v. Barnum*. 615

DAMAGES.

1. In an action to recover damages for injuries to plaintiff's premises caused by the construction and maintenance of an elevated railroad on a street in front thereof, it appeared that the premises in question extended from said street to another street in the rear and were covered by a single brick building. Formerly it consisted of two lots, having different owners; they were conveyed to one person in 1825, before defendants' road was authorized to be built, and since then have been conveyed and occupied as one lot. There was no evidence that portions of the premises fronting on each street were occupied separately. *Held*, that plaintiff was, as an abutting owner, entitled to recover his damages for injuries to the whole premises considered as a single lot; that while the fact that the premises were accessible to persons, property, light and air from both streets was important as bearing on the extent of the injuries, it did not preclude the recovery of any damages for injuries to that portion on another street. *Stevens v. N. Y. E. R. R. Co.* 95

2. One who perpetrates a fraud commits a wrong for which he is liable to the defrauded party in at least nominal damages, even though no actual damages are shown. *Pryor v. Foster.* 171
3. In an action to recover damages for alleged false representations made by defendant on leasing a house to plaintiff as to the relative capacity of, and quantity of coal required to run the furnace therein, plaintiff's evidence tended to establish the false representations, that defendant knew them to be false, and made them with intent to induce plaintiff to enter into the lease. It appeared that plaintiff's term commenced in midwinter; that he, immediately after taking possession, discovered that the furnace would not heat the house, and had several talks with defendant upon the subject, in which he stated he should hold the latter responsible. He continued in possession and paid the rent as it fell due. *Held*, that plaintiff had the right to continue to occupy the premises and demand the damages suffered through defendant's fraud which were the difference in the rental value of the premises as they were and as they would have been if as represented; that plaintiff's payment of the rent did not raise the presumption of an intent to waive the fraud or the right to such damages. *Id.*
4. One who interferes with another's right to the service of a third person, whether male or female, a minor or adult, is liable for actual compensatory damages, in the same manner and upon the same grounds that he would be liable for an unlawful interference with any other property right of another. *Lawyer v. Fritcher.* 239
5. Where the consent of a parent, entitled to and who is receiving the services of a daughter, to dispense with such services is obtained by fraud, it is void, and furnishes no defense to an action by the parent against the perpetrator of the fraud for damages resulting from the loss of service. *Id.*
6. In such a case where loss of service was shown, and it appeared that the daughter after being taken away from her father's house, was seduced by the defendant, *held*, that the jury had the right in their discretion to impose punitive as well as compensatory damages. *Id.*
7. In an action by a father to recover damages sustained by the unwarranted interference of defendant with plaintiff's right to the services of his daughter, the following facts appeared: Plaintiff's daughter, who was seventeen years of age, generally lived and performed services in her father's family. Defendant, who was a married man, fraudulently representing to plaintiff that he had a legal right to marry, obtained from plaintiff and his wife a consent in writing to his marriage to their daughter. Defendant then took her away from home, seduced her and, after cohabiting with her two nights, she, on discovering that his statement was false, took poison and died. *Held*, that plaintiff was entitled to maintain the action for the unlawful interference with plaintiff's right to the services of his daughter; and that the jury had a right, in their discretion, to impose punitive damages. *Id.*
8. In an action to recover damages resulting from injuries to plaintiff's daughter, alleged to have been caused by defendant's negligence, it appeared that at the time of the injuries she was between thirteen and fourteen years of age, and was accustomed to perform services in doing housework. Defendants' counsel asked the court to charge the jury that if plaintiff failed to prove the value of the time lost or facts on which an estimate of such value could be founded, only nominal damages for that item could be given. This request was refused, and the court charged that if the jury found plaintiff was entitled to recover, he was entitled to recover not only for loss of service, the result of the injury, up to the time of trial, but also for prospective loss during the child's minority, and also for expenses actually and necessarily incurred, or which would be immediately necessary

- in consequence of the injury in the care and cure of the child. *Held*, no error. *Dollard v. Roberts*. 269
9. Defendant entered into a contract in writing with plaintiff to furnish him a hall in the city of B. for four performances of a theatrical company, plaintiff to receive fifty per cent of the gross receipts. Plaintiff with his company came to B. in due time to perform his contract, but was refused the use of the hall. In an action upon the contract, *held*, that while the amount of profits plaintiff would have realized had the contract been performed, were not susceptible of proof, and so not recoverable, plaintiff was entitled to recover the amount of expenses legitimately and necessarily incurred by him for the purposes of the performance of the contract on his part; that it could not be assumed plaintiff would have lost any part of these expenditures had he been permitted to perform. *Bernstein v. Meech*. 354
10. Plaintiff entered into a contract with B. & S., by which the latter, for a valuable consideration, agreed, among other things, to assign to the plaintiff 2,000 shares of the capital stock of a certain corporation, said stock "to be full paid stock." B. & S. transferred to plaintiff certificates for the specified number of shares, but it was not full paid stock. On discovery of this plaintiff tendered back the certificates and demanded full paid stock, which was refused. In an action to recover damages for breach of the contract, it appeared and the referee found that the stock had no actual or market value at the time when B. & S. undertook to deliver. *Held*, that plaintiff was only entitled to recover nominal damages; that it was immaterial that defendants, in order to perform the contract, would have been compelled to pay par for the stock, as plaintiff was simply entitled to recover a sum which would indemnify him for the loss he had suffered by the default. *Barnes v. Brown*. 372
11. In an action by a married woman to recover damages for injuries

- sustained through the alleged negligence of defendant, the plaintiff was permitted to testify, under objection, that before the accident she did the housework and worked for her husband as a seamstress, receiving from him a weekly salary, but because of the injury was no longer able to do this work. The court charged that if plaintiff was entitled to recover she could recover for the loss of wages she had sustained. *Held*, error; that plaintiff could recover actual damages only; and that the consequential damages for loss of her services, both in the house and as seamstress, could be recovered only in a separate action brought by her husband in his own name. *Bluchinska v. H. M. & Home*. 497
12. The theory upon which an action at law may be supported against an elevated railroad company by an abutting owner upon a street through which it runs, is that it is in such sense a trespasser or wrong-doer as to be liable to such owner for all the injuries resulting proximately from the wrongful act of maintaining and operating its road. *Moore v. N. Y. E. R. R. Co.* 523
13. The continued invasion of the privacy of the occupant of a building, where it has the effect to reduce the rental value is such an injury, and for the damages so resulting the company is liable. *Id.*
14. While the looking in at the windows of a dwelling, by the patrons and employes of an elevated railroad company, from its platform and the stairs leading to the same, is not the act of said company, as the latter furnishes the means and opportunity and by its invitation and procurement for the purpose of its business, brings those persons where they can thus invade the privacy of said dwelling, it is liable for the damages thus occasioned. *Id.*
15. While for land taken by an elevated railroad company, the full market value must be paid without deduction for benefits, in considering the question as to damages

caused by the road to lands not taken, or to the property rights of an abutting owner in the streets through which its road runs, its advantages and disadvantages, benefits and injuries must be considered, and if the benefits equal or exceed the injuries, no damages can be awarded. *Odell v. N. Y. E. R. R. Co.* 690

— *In an action to restrain defendant from operating an elevated railroad in a street in front of plaintiff's premises, he is entitled to recover a sum awarded for damages to the fee as a condition for denial of the injunction. See Hughes v. M. E. R. Co.* 14

DEATH.

— *Where, in a foreclosure suit, an order was obtained for service of summons by publication on a non-resident defendant, and pending publication the plaintiff died, held, that to give the court jurisdiction, the publication should have been commenced de novo after substitution of personal representative of decedent as plaintiff. See Reilly v. Hart.* 625

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.
CREDITOR'S SUIT.

DECEIT.

See FRAUD.

DEED.

1. *It seems* that where, in the description of premises in a deed, courses, distances and monuments are given, the premises must be located according to the deed, and all parol evidence of the declarations and acts of the parties to the effect that a different location was intended is inadmissible, as contradicting or varying the deed; but where the description is so vague, obscure or conflicting as to leave the intent of the parties uncertain, their declarations and acts may be proven to determine the intent. *Harris v. Oakley.* 1

2. H. was the owner of certain premises divided into two parts by a fence; on the north part was a hotel and outbuildings, the south part was used as a garden; he executed a conveyance to defendant, the description including the whole premises, "excepting and reserving therefrom 137 feet front and rear, measuring from George Harrison's north line, * * * being the piece of land occupied as a garden." H. thereafter conveyed to plaintiffs the portion not conveyed to defendant. The fence was 137 feet north of Harrison's line at the front end, but in the rear 137 feet extends nineteen and one-half feet north of the fence, and a line run from this point to the front parallel with Harrison's line would run diagonally through a barn or outhouse on the hotel premises. In an action of ejectment to recover possession of the triangular strip north of the fence, the court found that H., at the time of the conveyance to defendant, put him in possession of this strip, and that the same was in defendant's possession at the time of the conveyance to plaintiff. *Held*, that a judgment in favor of plaintiff was error; that as there were two conflicting descriptions of the land reserved in defendant's deed the declarations and acts of the parties were proper to be considered for the purpose of showing their intent; and that putting defendant in possession of all the land north of the fence was a practical location of the line and disclosed the intent to be simply to except the garden lot. *Id.*

3. In an action to restrain defendant from obstructing an alley-way, the following facts appeared: D., who owned a parcel of land on the corner of two streets in New York city, built thereon four houses fronting on one of the streets, with a stable in the rear of each, leaving an alley-way which afforded access from the side street to the stables. D. subsequently conveyed the corner lot to defendant, reserving "the right of way through and over the carriage or alley-way" to the three stables on the other lots "as long as the said three stables shall be occupied as private

stables." The third lot was conveyed to plaintiff. Defendant built over the alley-way a brick building, resting on iron girders, supported by walls on either side. The trial court found that the carriage-way was left as convenient, in regard to breadth, for egress and ingress of vehicles as it was before the changes were made; that it did not appear that such egress and ingress had been in any respect interfered with or rendered less commodious, and that the alley, as it now exists, has sufficient light and air for all purposes of egress and ingress. The complaint was dismissed. *Held*, no error; that defendant's deed vested in him all the rights of absolute ownership, except as restricted by the reservation; that, under the reservation, plaintiff had no right to claim that the whole alley-way should be left open for his use, or to furnish light and air to his stable, but only so much thereof as would afford convenient access to his stable in the usual way, and as would furnish light and air needed for the reasonable enjoyment of the way. *Grafton v. Moir.* 465

4. One C., being the owner of certain premises upon which was a lane or driveway sixteen feet in width, running east from a street, upon the south side of which lane was a store with a hatchway, giving access to the cellar which projected into the lane about five feet, sold and conveyed by full covenant deed to B., "his heirs and assigns," that portion of the premises north of the lane, "also a right of way the whole length of the south line" of the premises conveyed, "between said south line and a line drawn parallel with the north side of the store * * * to be used by the grantee in common with the grantor, said lane not to be encumbered or built upon by either party." C. subsequently sold and conveyed the remaining portion of said premises, reserving the right of way between the store and B.'s south line, to be used mutually by the grantee and B., "their heirs or assigns respectively." Defendant, having acquired title to the south portion, erected a building thereon

which occupied over four feet of the lane. In an action brought by defendant, who had acquired title to the north portion, to compel the removal of that part of the building which encroached upon the way, *held*, that the covenant that the lane "was not to be encumbered or built upon by either party," was one running with the land; that the words "either party" were not used in a restrictive sense, but as including all persons whom the party undertook to represent and bind with himself, that is, "his heirs, executors, administrators and assigns;" and that, therefore, plaintiff was entitled to the relief sought. *Dexter v. Beard.* 549

5. An unrecorded conveyance of real estate is not void as against a subsequent purchaser, although for a valuable consideration, who had notice at the time of his purchase of the unrecorded deed; he cannot claim the benefit of the Recording Act. *Dingley v. Bon.* 607

DEFENSE.

1. Where the consent of a parent, entitled to and who is receiving the services of a daughter, to dispense with such services is obtained by fraud, it is void, and furnishes no defense to an action by the parent against the perpetrator of the fraud for damages resulting from the loss of service. *Lawyer v. Fritcher.* 239
2. When a liability of a physician and surgeon for negligence or malpractice is established, proof that the patient, after the liability was incurred, disobeyed the orders of the physician and so aggravated the injury, does not discharge the liability; it simply goes in mitigation of damages. *DuBois v. Decker.* 325
3. Where an indigent person, having met with an accident, was taken to an alms-house, and was treated and attended there by a physician employed and paid by the public, *held*, that it was no defense, in an action for malpractice, that he was not employed by, and that there

was no contract relations between, him and plaintiff. *Id.*

4. *It seems*, the fact that a physician or surgeon renders his services gratuitously does not absolve him from the duty to exercise reasonable and ordinary care, skill and diligence. *Id.*

DEFINITIONS.

1. The term "abutting lot" means one bounded on the side of a public street, in the bed or soil of which the owner of the lot has no title, interest or private rights, except such as are incident to a lot so situated. *Hughes v. Met. E. R. Co.* 14
2. A policy of marine insurance contained a warranty that the vessel insured should not be loaded more than the "registered tonnage," with lead, marble, coal or iron on any one passage. *Held*, that the term "registered tonnage" had reference to that specified in the register under which the vessel sailed, and that upon an allegation of a breach of the warranty, the question was as to whether the cargo was of greater weight than that specified in the ship's register. *Reck v. Phenix Ins. Co.* 160
3. The term "desertion," as used in the law of divorce, contemplates a voluntary separation of one party from the other, without justification and with the intention of not returning. *Williams v. Williams.* 193

DEVISE.

1. Under the law, as it existed in this state prior to the revision of 1830, a testator could only devise such lands as he was seized and possessed of at the time of the making and publishing of his will, save where he was at that time in possession under equities, which the court would enforce, in which case such rights and equities would pass under a devise. *Dodge v. Gallatin.* 117
2. In February, 1807, R. made and published his will, by which he

devised all his residuary real estate of which he was then or might be seized and possessed of at the time of his death to C. At that time R. was the owner of certain lands in the city of New York, bounded easterly by the high-water mark of the Hudson river; he subsequently petitioned the common council for a grant of land under water in front of his uplands. Such a grant was executed and delivered in November, 1807. R. died in 1809 without republishing his will. In an action of ejectment brought to recover two lots, part of the lands covered by said grant, in which action defendants claimed title under said will, it appeared that in 1794 the board of aldermen of said city passed a resolution to grant the then owner of said uplands the water lots in front thereof. In 1797 the then owner petitioned said board for a grant so that he might build a bulkhead and fill in his water lots; this was referred to a committee, who reported in favor of a grant, which report was agreed to by the board. It did not appear that any conveyance was executed; but it appeared that the petitioner, prior to 1799, took possession, docked out and filled in the lots and had the use of the property from that time. In 1798 the city presented a petition to the legislature setting forth, among other things, that it had lately directed a permanent street to be laid out at the extremity of its grants "already made and thereafter to be made" on said river, and asking authority to compel the proprietors of the lots fronting thereon to make the street. Thereupon an act was passed (Chap. 80, Laws of 1798), authorizing the city to lay out the street at the expense of the adjoining proprietors, and requiring the proprietors of the uplands, who had not acquired title to the land under water, to fill up the space between their lots and said street. The act provided that upon their doing this they shall "be respectively entitled to become the owners of the said intervening space of ground in fee simple." The city accepted the act, and, in pursuance thereof, the then owner of the upland adjoin-

ing the land conveyed by said grant, filled in the space between his uplands and said street. *Held*, that these facts disclosed an equitable title in R. at the time of the execution of his will, which passed by the devise. *Id.*

3. *It seems* a controversy as to the amount due upon a contract for the purchase of real estate would not prevent its passing by devise in the will of the purchaser executed prior to 1880; subject, however, to the amount that should be found due. *Id.*

See WILLS.

DIVORCE.

1. The term "desertion," as used in the law of divorce, contemplates a voluntary separation of one party from the other, without justification and with the intention of not returning. *Williams v. Williams*. 193
2. The marriage relation is not a *res* within the state of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind an absent party, a citizen of another state, by substituted service or actual notice given without the jurisdiction of the court where the action is pending. *Id.*
3. A judgment, therefore, of divorce rendered in another state against a resident of this state, where there has been no personal service of process within the state rendering it, and no personal appearance by the defendant in the action, is inoperative and void in this state. *Id.*
4. In an action for a separation the following facts appeared: The parties were married in this state in 1879; they lived together until in April, 1880, when defendant refused to permit plaintiff to live with him unless she would give up all intercourse with her mother; no reason was disclosed for imposing such condition, and plaintiff declining to accede to it, they did not thereafter live together. In 1882 defendant removed to Minne-

sota; before he left, plaintiff offered unconditionally in good faith to live with him; this he refused. He procured a divorce in Minnesota from plaintiff on the ground of desertion; she was personally served out of that state with the summons and complaint in the divorce suit. The judgment-roll therein was offered in evidence and excluded. *Held*, no error. *Id.*

5. The court found as a fact that defendant had abandoned plaintiff, and rendered judgment as prayed for in the complaint. *Held*, no error; that defendant had no cause of action in this state against plaintiff for desertion; that plaintiff's act in leaving him was not voluntary, and upon her offer to return unconditionally, defendant was not justified in refusing to receive her; that plaintiff being legally the wife of defendant within this state, must be considered as legally entitled to all the rights flowing from that relation under the Constitution and laws of the state and of the United States. *Id.*

EASEMENTS.

1. The right of an owner of a lot, abutting on a public street in a city to use and enjoy the light, air and access afforded by the street, is an appurtenance of his lot and property, for which, if taken for purposes inconsistent with street uses, compensation must be made, and if not taken, but injured by such uses, the damages sustained may be recovered. *Hughes v. Met. E. R. Co.* 14
2. This right does not originate in a grant, and so its existence need not be established by conveyance in specific terms, nor by adverse possession; it arises by operation of law from contiguity, and its existence is presumed. *Id.*
3. The use of a city street by an elevated railroad is a use inconsistent with the purposes for which such streets are designed. *Id.*
4. The term "abutting lot" means one bounded on the side of a pub-

- lic street, in the bed or soil of which the owner of the lot has no title, interest or private rights, except such as are incident to a lot so situated. *Id.*
5. *It seems*, the presumption existing in favor of an abutting lot owner may be rebutted by showing that the rights have been parted with in any of the modes by which incorporeal hereditaments may be transferred, surrendered or lost. *Id.*
6. The burden of rebutting such presumption, however, is on the party who claims to have acquired such right. *Id.*
7. The owners of lots abutting on a city street have, although the fee thereof is in the municipality, certain rights and privileges therein, in the nature of easements, which constitute property, and of which they may not be deprived without just compensation. (State Const. art. 1, § 6.) *Egerer v. N. Y. C. & H. R. R. Co.* 108
8. An elevated railroad erected in a city street, the right to construct and operate which has not been obtained by purchase from the abutting owners, or by proceedings to condemn, is, as to them, an illegal structure, and a continuing trespass upon their rights, from the time it was built. *Thompson v. Manhattan R. Co.* 360
9. A right of way, which is reserved, but not specifically defined in a conveyance, need only be such as is reasonably necessary and convenient for the purpose for which it was created. *Grafton v. Moir.* 465
10. Where the owner of land, subject to an easement, claims to own it free from the easement, and excludes for twenty years the owner thereof, who acquiesces in the exclusion, the easement is lost by adverse possession. *Woodruff v. Paddock.* 618
11. So also an abutting owner's private rights in a street may be lost in case their existence is denied and they are exclusively possessed for more than twenty years by one claiming the fee of the street. *Id.*
12. In 1826 B., the owner of certain land in the city of R., laid it out into lots, and a map thereof was recorded; he sold and conveyed a lot, which in the deed was described by number, as designated on the map, which was referred to; this showed the lot as bounded on one side by an alley. The alley was used by the public until 1846, when such use was abandoned. C. became the owner of said lot in 1856; he was at the time the owner of the lot on the opposite side of the alley, and had since 1850 kept the same closed, had planted trees and erected a coal-shed thereon; he continued in the actual, exclusive and notorious possession thereof, claiming to own it until his death in 1888. In 1860, C. conveyed the lot first mentioned by the description contained in the original deed. Plaintiff became the owner thereof 1884. Defendant, in 1888, became the owner of part of the other lot, the description in his deed including the alley; he entered into possession and began the erection of a building thereon. In an action to restrain defendant from excluding plaintiff from using as a way the strip of land, formerly the alley, *held*, that while the grantee of B. of plaintiff's lot acquired a right of way in the alley, the easement had been lost by the non-user of plaintiff's predecessors, and by the adverse possession of C. and his successors. *Id.*

See PRIVATE WAY.

ELECTION OF REMEDIES.

1. Where a fraud is perpetrated in procuring the execution of a contract, the party defrauded has an election of remedies; he may, after knowledge of the fraud, rescind and recover back that which he has parted with, or he may continue to perform on his part, and, unless he has waived the fraud, maintain an action for the damages sustained. *Pryor v. Foster.* 171
2. If he rescinds, he must do so immediately on discovering the

fraud; and if he continues to perform under the contract, he will be considered to have elected to affirm it. *Id.*

EMINENT DOMAIN.

1. The legislature may vest a private person or corporation with the right of eminent domain, when the use to be made thereof is to acquire property for the public benefit. *Pocantico W. W. Co. v. Bird.* 249
2. In order to make the use public, a duty must devolve upon the person or corporation to furnish the public with the use intended. This use may be limited to the inhabitants of a small or restricted locality, but it must be to those inhabitants in common, and not for a particular individual. *Id.*
3. The question of public use is a judicial one, and must be determined by the courts. *Id.*

EQUITY.

1. Where, in an equity action, no objection is raised by answer or upon trial that such an action is not the appropriate remedy, the objection is not available upon appeal. *B. S. & C. Co. v. D., L. & W. R. R. Co.* 152
2. Where, in an equity action, the defendant does not plead want of equitable jurisdiction, or allege that plaintiff has an adequate remedy at law, he may not insist upon the trial that an action in equity will not lie. *Watts v. Adler.* 646
3. An action in equity for an accounting between copartners is an appropriate, if not an exclusive, remedy to adjust and settle the partnership affairs. *Id.*

ESTOPPEL.

1. A party to a contract, containing a provision that it shall not be modified or changed, except by a writing signed by him, may by

conduct estop himself from enforcing the provision against a party who has acted in reliance upon such conduct. He may also be estopped by the acts of an agent who possesses, or whom he has held out to possess, his power in respect to the provision. *Bishop v. Agricultural Ins. Co.* 488

2. Silence operates as an assent and creates an estoppel only where it has the effect to mislead. *More v. N. Y. B. F. Ins. Co.* 537
3. In an action to have an assignment, executed by defendant G., of certain judgments in his favor against the other defendants, set aside as fraudulent, and to compel a reassignment thereof to plaintiff, it appeared that the judgments were upon a claim of plaintiff, who, as he testified, being a non-resident, transferred the claim to G., who was irresponsible, for a nominal consideration to avoid giving security for costs. G. transferred the judgments to one who purchased as agent for the other defendants. In the action brought by G., the plaintiff here testified that he made the assignment to G. *bona fide* and absolutely. *Held*, that plaintiff was estopped from denying that the claim was the absolute property of G. *Anthony v. Wise.* 662

EVIDENCE.

1. *It seems* that where, in the description of premises in a deed, courses, distances and monuments are given, the premises must be located according to the deed, and all parol evidence of the declarations and acts of the parties to the effect that a different location was intended is inadmissible, as contradicting or varying the deed; but where the description is so vague, obscure or conflicting as to leave the intent of the parties uncertain, their declarations and acts may be proven to determine the intent. *Harris v. Oakley.* 1

2. In an action for an accounting between partners one of the schedules of the account consisted of items claimed to have been paid

by defendant for repairs to real estate purchased by the firm, but title to which was taken in the name of defendant. Defendant was asked if he paid the items in said schedule; this was excluded on plaintiff's objection. Previous to this it had been shown that the case had been tried partially before another referee, who died before the trial was completed; defendant testified that he had vouchers for the payments made by him which had been left with the former referee; that he had been informed by the person in charge of said referee's office that they had been transmitted to the new referee, and that the latter had not been able to find them. *Held*, that the evidence was competent and its exclusion error. *Van Bokkelen v. Berdell*. 141

3. Plaintiff was asked and permitted to answer under objection and exception, as to what facts were shown upon the trial before the former referee. He testified the facts shown were that defendant made a mortgage on said real estate, which was not recorded for a long time after. *Held*, that the evidence was incompetent, as it was plaintiff's conclusion as to what was proved before the former referee; that it was important, as it tended to show that defendant had encumbered the property, and so the error required a reversal. *Id.*

4. While a witness may be discredited by showing his conviction for an offense, it is not competent to discredit him by showing simply that he has been indicted. *Id.*

5. In an action for a separation the following facts appeared: The parties were married in this state in 1879; they lived together until in April, 1880, when defendant refused to permit plaintiff to live with him unless she would give up all intercourse with her mother; no reason was disclosed for imposing such condition, and plaintiff declining to accede to it, they did not thereafter live together. In 1882 defendant removed to Minnesota; before he left, plaintiff offered unconditionally in good faith to

live with him; this he refused. He procured a divorce in Minnesota from plaintiff on the ground of desertion; she was personally served out of that state with the summons and complaint in the divorce suit. The judgment-roll therein was offered in evidence and excluded. *Held*, no error. *Williams v. Williams*. 193

6. In an action of ejectment, plaintiff claimed title under a sheriff's deed upon sale on execution against the F. D. Co. Upon the trial, plaintiff offered in evidence a judgment record, which showed that one R. purchased the premises and took conveyances, paying a portion of the purchase-moneys and giving his bonds, secured by mortgage on the premises, for the balance; that thereafter an arrangement was made between him and said company by which it assumed the purchases and became entitled to the benefit thereof, and thereupon it paid to R. the amount paid by him, and thereafter used and enjoyed the premises, paying interest on the bonds. *Held*, that the record was properly excluded; that the legal title was in R.; that the judgment record simply disclosed that the F. D. Co. had an equitable title subject to the mortgages, which title was not saleable upon execution; and so, that the sheriff's deed conveyed no title to the purchaser. *Bates v. Ledgerwood Mfg. Co.* 200

7. In an action by an undertaker to recover articles furnished and services performed in the burial of defendant's testator, defendant set up as a counter-claim an indebtedness of plaintiff to her testator, which was greater than the amount in suit, and asked for judgment for the excess. Defendant was the sole legatee and devisee under, and executrix of, the will. It was admitted that no notice to creditors to present claims had been published. Defendant testified that her testator owed very few debts when he died, and that she had paid those debts. She then offered to prove the counter-claim. The evidence was rejected, the referee ruling that the testator's claim was not avail-

- able as a counter-claim or set-off. *Held* (BRADLEY and PARKER, JJ., dissenting), error; that defendant was entitled to show, by common-law evidence, that all the testator's debts had been paid, and, having established that fact, was entitled to have the amount of plaintiff's indebtedness allowed as a counter-claim. *Blood v. Kane*. 514
8. In an action by a stock broker who held collateral security for the stock transactions of a customer, to recover a balance found due him on closing up the transactions, it appeared that plaintiff sold out the stock purchased and carried for defendant, pursuant to his order. Defendant offered to prove that it was the custom of stock brokers, where collateral was put up as a margin, and the account became sufficiently reduced to jeopardize it, to advertise and sell the collateral and charge his customer with the balance, and that this custom was known to plaintiff at the time the margin was put up and the account closed. This was excluded on objection. *Held*, no error; that whatever the custom of brokers might be while a speculation was pending, it had no application to a broker's right to recover what is due him after he has carried his customer's stock as long as requested, and finally sold pursuant to an express order. *De Cordora v. Barnum*. 615
9. In an action by an abutting owner against an elevated railroad company operating its road in a city street, the opinion of a witness as to what would have been the value of the property if the road had not been built is incompetent. *Kernochan v. N. Y. E. R. R. Co.* 651
10. In an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, plaintiff may not support his own testimony, as to the effect of the injuries, by proof of declarations to the same effect made by him after the accident, and forming no part of the *res gestæ*, to persons other than a physician in attendance upon him professionally. *Kennedy v. R. C. & B. R. R. Co.* 654
11. *It seems*, the rule was different, prior to the passage of the statute allowing parties to be witnesses. *Id.*
12. *It seems*, also, that evidence of involuntary exclamations, which are natural concomitants and manifestations of pain and suffering, are still admissible where they form part of the *res gestæ*. *Id.*
13. But complaints made which are so far detached from the occurrence as to admit of deliberate design, and of their being the product of a calculating policy on the part of the complainant, cannot properly be regarded as part of the *res gestæ*. *Id.*
14. While, when in an action against a railroad or municipal corporation to recover damages for injuries alleged to have been caused by defendant's negligence, it is important to show that defendant had notice of the dangerous character of the defect which caused the injury, testimony is competent to prove other similar accidents, such evidence is not competent where it can have no bearing upon the issues presented. *Dye v. D., L. & W. R. R. Co.* 671
15. Where, therefore, in an action by an employe against a railroad company to recover damages for injuries sustained by plaintiff when engaged in coupling two cars, occasioned by the overlapping of the dead-woods of the cars, defendant claimed that plaintiff had full knowledge of and took the chances of the danger, and gave evidence to the effect that it used on its road different kinds of cars, some without any dead-woods, and that switchmen in its employ had frequently to make couplings of cars, the dead-woods of which overlapped, *held*, that the admission of testimony showing that similar accidents had occurred on defendant's road was error. *Id.*
16. In an action upon a disputed claim it is not competent for plaintiff to prove an offer to compromise by paying a specified sum,

made by defendant for the purpose of procuring a settlement of the controversy. *Smith v. Satterlee*. 677

— When old maps, plans and other papers are admissible in evidence as ancient writings.

See *Dodge v. Gallatin*. 117

— When journal of house of state legislature may be resorted to to determine as to whether an act was passed by a two-third vote.

See *Rumsey v. N. Y. & N. E. R. R. Co.* 88

— When parol evidence may be given of the contents of an order for the payment of a sum of money which is only collaterally in question.

See *Daniels v. Smith* (Mem.). 696

EXCEPTION.

1. An omission to find facts claimed by the unsuccessful party to a suit to be warranted by the evidence, can only be taken advantage of by an exception to a refusal to so find, upon request duly made as required by the Code of Civil Procedure (§§ 993, 1023). *Ostrander v. Hart*. 406

2. Although a finding of fact by a referee is wholly unsustained by evidence, if not excepted to, no legal question is presented which the court may pass upon. *Daniels v. Smith*. 696

3. An exception in terms to the referee's conclusion of law cannot avail the party excepting, if such conclusion was required by the findings of fact on which it was based. *Id.*

4. Upon a trial before a referee, defendant presented requests to find, which were refused. He thereupon excepted as follows: Defendant separately excepts "to the refusal of the referee to find each of the several seventeen conclusions submitted to the referee by the said defendant so far as the referee's conclusions are not in conformity therewith." *Held*, that such exception was not sufficiently definite and specific to present a question for review. *Id.*

EXECUTION.

1. An equitable title to real estate is not a subject of levy and sale on execution. (1 R. S. 744, § 4.) *Bates v. Ledgebrook Mfg. Co.* 200

2. In an action of ejectment, plaintiff claimed title under a sheriff's deed upon sale on execution against the F. D. Co. Upon the trial, plaintiff offered in evidence a judgment record, which showed that one R. purchased the premises and took conveyances, paying a portion of the purchase-moneys and giving his bonds, secured by mortgage on the premises, for the balance; that thereafter an arrangement was made between him and said company by which it assumed the purchases and became entitled to the benefit thereof, and thereupon it paid to R. the amount paid by him, and thereafter used and enjoyed the premises, paying interest on the bonds. *Held*, that the record was properly excluded; that the legal title was in R.; that the judgment record simply disclosed that the F. D. Co. had an equitable title subject to the mortgages, which title was not saleable upon execution; and so, that the sheriff's deed conveyed no title to the purchaser. *Id.*

3. Under the provisions of the act of 1850 (Chap. 295, Laws of 1850) and the similar provision of the Code of Civil Procedure (§ 1380), providing that after one year from the death of a party against whom in his life-time a final money judgment had been rendered, the same "may be enforced by execution against any property upon which it is a lien," with like effect as if the judgment debtor was still living, no distinction is made between judgments upon sole, joint, or joint and several contracts, and the land of a deceased surety, against whom, as surety, a judgment has been recovered, and has become a lien upon said land in his life-time, is not excepted, and is not relieved from the lien by his death. *Baskin v. Huntington*. 313

4. Where, therefore, prior to the death of one of the makers of a joint and several promissory note, who

executed it as surety, judgment had been recovered against him thereon, and had become a lien upon his real estate, *held*, that the lien of the judgment was not discharged by his death, and was enforceable by execution issued as prescribed by the Code of Civil Procedure (§§ 1379, 1380, 1391); and this, although the judgment was recovered and the surety died before the going into effect of the provision of the Code (§ 758, as amended in 1877) declaring that the estate of a person jointly liable with others upon contract shall not be discharged by his death.

Id.

EXECUTORS AND ADMINISTRATORS.

1. An executor, as such, takes the unqualified legal title to all personalty not specifically bequeathed and a qualified legal title to that which is so bequeathed, and holds as trustee for the benefit of, first, his testator's creditors; second, of the distributees under his will, or, if the whole is not bequeathed, under the Statute of Distributions. *Blood v. Kane.* 514
2. The trust estate of a sole executor, who is also the sole devisee and legatee, is solely for the benefit of the testator's creditors; when they are paid, that estate sinks into and is merged with the beneficial interest and he as devisee and legatee becomes vested with the legal title. *Id.*
3. Upon proof, therefore, that all the debts of the testator have been paid, an executor, who is sole legatee, may avail himself of a chose in action belonging to the estate, as a counter-claim in an action against him. *Id.*
4. In an action by an undertaker to recover articles furnished and services performed in the burial of defendant's testator, defendant set up as a counter-claim an indebtedness of plaintiff to her testator, which was greater than the amount in suit, and asked for judgment for the excess. Defendant was the sole legatee and devisee under,

and executrix of, the will. It was admitted that no notice to creditors to present claims had been published. Defendant testified that her testator owed very few debts when he died, and that she had paid those debts. She then offered to prove the counter-claim. The evidence was rejected, the referee ruling that the testator's claim was not available as a counter-claim or set-off. *Held* (BRADLEY and PARKER, JJ., dissenting), error; that defendant was entitled to show by common-law evidence, that all the testator's debts had been paid, and, having established that fact, was entitled to have the amount of plaintiff's indebtedness allowed as a counter-claim. *Id.*

FARM CROSSINGS.

1. The provision of the General Railroad Act (§ 44, chap. 140, Laws of 1850), requiring corporations organized thereunder to "erect and maintain fences on the sides of their road * * * with openings or gates or bars therein, and farm crossings of the road for the use of the proprietors of lands adjoining such railroad," was designed to compel such corporations to construct and maintain such crossings over their lines as are necessary to enable owners, having land abutting on either or both sides of the road, to reach and work their properties. *B., S. & C. Co. v. D., L. & W. R. R. Co.* 152
2. The statute does not limit the right of adjoining owners to crossings solely for agricultural purposes, but they may be ordered to enable owners to remove the natural products of the land, or stone, minerals, etc., therefrom. *Id.*
3. Nor is the right limited to a proprietor, a strip of whose land has been taken for the road, leaving remaining portions adjoining such strip on both sides. *Id.*
4. While the provision of the act of 1864 (§ 2, chap. 582, Laws of 1864), requiring the lessee of a railroad to "maintain fences on the sides of the road so leased * * * with

openings or gates or bars therein at the farm crossings of such railroad, for the use of the proprietors of the lands adjoining such railroads," does not expressly require such lessee to build and maintain farm crossings, yet it is the duty of such a lessee in possession, with power to make repairs and additions, to construct necessary farm crossings. *Id.*

5. This obligation is not confined to domestic corporations or those organized under the General Railroad Act, but applies to a foreign corporation which, under authority given to it by statute, has leased and is operating a road in this state, and has covenanted by its lease to perform all things in connection with the road which the lessor might be required to perform. *Id.*
6. Where, therefore, defendant, a corporation organized in another state, having been authorized by statute (Chap. 244, Laws of 1855) to contract with corporations in this state and to sue and be sued in its courts, leased the road of a railroad corporation of this state, the lease containing a provision requiring the lessor "to do and perform all acts and things" which the lessor "would be bound by law to do and perform" had the lease not been made, *held*, that the duty of constructing farm crossings, in the cases prescribed, was imposed upon it. *Id.*

FINDINGS OF LAW AND FACT.

1. When the findings of a court are so inconsistent that they cannot be reconciled, those which are most favorable to the appellant are controlling upon the appellate court. *Traders' Nat. Bank v. Parker.* 415
2. This rule, however, applies only when the findings cannot by reasonable construction be reconciled; it is the duty of the courts to reconcile them, if possible. *Id.*
3. Plaintiff held a note against H. & J., and threatened to bring suit thereon. Defendant, a creditor of H., who was financially embar-

rassed, requested plaintiff to delay prosecution. Plaintiff offered to extend the time for the payment of the note if defendant would sign it. This he did. No time of extension was agreed upon. It was understood that defendant was at the time intending to attend the sale of certain property of H. under a chattel mortgage, from which it was hoped that something might be realized, to be applied in payment of the note. In an action upon the contract so made by defendant, the referee found that the consideration for defendant's contract consisted in plaintiff's agreement to extend the time of payment of the note, but that it did not agree to extend for any definite period, and upon defendant's request, he further found, that plaintiff did not waive the right to sue H. & J., or either of them, whenever he saw fit. *Held*, that the conclusion of the referee that plaintiff did not waive his rights was to be construed as an inference from the evidence, and not as an existing or independent fact, and so was in that respect rather a finding of law than one of fact, and was not controlling. *Id.*

FORECLOSURE.

1. The will of F., after directing the payment of his debts, etc., by its terms gave all of his estate to his executors, *i. e.*, his wife and H., "to have and to hold the same to themselves, their heirs and assigns forever upon the uses and trusts following." The will then gave various legacies to the testator's children; these were followed by a residuary clause by which he gave all the residue of his estate, "after providing for the aforesaid bequests. * * * absolutely and forever" to his wife. "Full power and authority" was given to the "said trustees, executor and executrix * * * to sell any or all" of the real estate "as they may deem best." The executors were appointed trustees and guardians of the children during their minority. H. omitted to qualify as executor, and letters testamentary were granted to the widow alone. In an action to

foreclose a mortgage on certain real estate of which F. died seized, the widow was made a party, but H. was not. Defendant, who acquired title under the foreclosure sale, contracted to sell the same to plaintiff. In an action to recover back moneys paid and expenditures under the contract, on the ground of defect in defendant's title, *held*, that no valid trust was created by the will; that the purposes of the testator could be accomplished through a trust power; that the trustees took no title to the real estate, but the same vested in the widow; and, therefore, that H. was not a necessary party to the foreclosure suit, and defendant acquired a good title under the sale. *Steinhardt v. Cunningham*. 292

2. An order was obtained for service by publication of the summons in a foreclosure suit upon the owner of the equity of redemption, who was a non-resident, but before the completion of the service the plaintiff died, and publication was thereafter continued to the termination of the six weeks directed by the order; afterwards the action was continued pursuant to the order of the court in the name of the executrix of the deceased plaintiff, without further publication or appearance on the part of said defendant. A judgment of foreclosure and sale was rendered and a sale made pursuant thereto. Upon a case submitted to determine as to whether plaintiff, who claimed title to the land under the foreclosure sale was entitled to the specific performance of a contract for the purchase thereof, *held*, that there was no effectual service of the summons in the foreclosure suit upon said defendant therein, and as to him the court acquired no jurisdiction, and as the equity of redemption was not barred by the sale, plaintiff was not able to convey a good title; that the effect of the death of the original plaintiff in the foreclosure suit was to suspend further proceedings other than for the continuance of the action, until his executrix was substituted; that while the order for service by publication may have remained available to give

the court jurisdiction, the publication should have been commenced *de novo* after the substitution and continued for the requisite six weeks. *Reilly v. Hart*. 625

See MECHANICS' LIEN.
MORTGAGE.

FOREIGN CORPORATIONS.

Where defendant, a corporation organized in another state, having been authorized by statute (Chap. 244, Laws of 1855) to contract with corporations in this state and to sue and be sued in its courts, leased the road of a railroad corporation of this state, the lease containing a provision requiring the lessor "to do and perform all acts and things" which the lessor "would be bound by law to do and perform" had the lease not been made, *held*, that the duty of constructing farm crossings, in the cases prescribed, was imposed upon it. *B. S. & C. Co. v. D., L. & W. R. R. Co.* 152

FOREIGN JUDGMENT.

1. The marriage relation is not a *res* within the state of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind an absent party, a citizen of another state, by substituted service or actual notice given without the jurisdiction of the court where the action is pending. *Williams v. Williams*. 193
2. A judgment, therefore, of divorce rendered in another state against a resident of this state, where there has been no personal service of process within the state rendering it, and no personal appearance by the defendant in the action, is inoperative and void in this state. *Id.*
3. A state may adjudge the status of its citizens towards a non-resident, and so long as the operation of such a judgment is kept within its own confines, other states must acquiesce, but it has no effect beyond the limits of the state. *Id.*

FORMER ADJUDICATION.

1. In an action of ejectment, plaintiff claimed title under a deed from an assignee in bankruptcy of H., a former owner of the premises. Defendant P. claimed title under a sale on foreclosure of a mortgage executed by H. before the institution of the bankruptcy proceedings. It was claimed by plaintiff that, at the time of the foreclosure, the mortgage was paid. It appeared that S., the mortgagee, brought an action to set aside the foreclosure proceedings and sale, to which action H., individually and as executor and trustee of his wife, who bid off the premises on the sale, and his assignee in bankruptcy were made parties; the assignee did not answer; H. answered, alleging that the premises were struck off to his wife in pursuance of an agreement between her and S. No copy of this answer was served on the assignee. On trial of that action, the court found that Mrs. H. advanced moneys and acquired rights under the sale which her estate was entitled to hold, although the claim secured by the mortgage was paid, and a decree was entered to the effect that the foreclosure was valid, and that S. was not entitled to have the same vacated. The trial court here decided that said judgment was a bar to this action; that the assignee, being a party, was bound by the decision; and so that he had no title and could convey none to plaintiff. *Held*, error; that the judgment was neither conclusive as a bar nor as evidence against plaintiff, because no demand was made in the pleadings which called upon the assignee to defend his title as against H., and no adjudication was made between him and any party to the action. *Ostrander v. Hart.* 406
2. The rule of *res adjudicata* applies to all judicial determinations, whether made in actions or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination. *Culross v. Gibbons.* 447
3. An order, therefore, made upon

petition authorized by statute, is conclusive as between the parties before the court, and can only be reviewed upon appeal. *Id.*

4. In an action to compel the specific performance of a contract for the purchase of land, the following facts appeared: The premises were conveyed in 1854 by J. & G. to H., by deeds which recited that the grantors had conveyed portions thereof to L., S. & B. and taken back from them mortgages thereon and that the grantors intended to convey their interests in the premises and in said mortgages. Plaintiff took title under said deeds. No deed to L., S. or B. appeared on record. K., plaintiff's grantor, contracted to purchase the premises, but refused to perform his contract because of the recitals in the deeds to H. Thereupon an action to compel specific performance was brought against K. which resulted in a judgment for specific performance; K.'s objections, being overruled upon the ground that it appeared the recitals in the deeds were not true in fact, that no deeds were ever given to L., S. or B. but simply executory contracts, which were subsequently canceled and surrendered. K. thereupon took title. *Held*, that as neither L., S. nor B. were made parties to said action, they were not bound by the judgment, and it was not binding upon the defendant. *Dingley v. Bon.* 607

FRAUD.

1. *It seems* in order to recover damages for false representations, fraud must be proved and cannot be presumed; the representations must be shown to have been made with a knowledge that they were false and untrue, and for the purpose of deceiving the plaintiff, and that they had that effect. *Pryor v. Foster.* 171
2. One who perpetrates a fraud commits a wrong for which he is liable to the defrauded party in at least nominal damages, even though no actual damages are shown. *Id.*

3. Where a fraud is perpetrated in procuring the execution of a contract, the party defrauded has an election of remedies; he may, after knowledge of the fraud, rescind and recover back that which he has parted with, or he may continue to perform on his part, and, unless he has waived the fraud, maintain an action for the damages sustained. *Id.*

4. If he rescinds, he must do so immediately on discovering the fraud; and if he continues to perform under the contract, he will be considered to have elected to affirm it. *Id.*

5. In an action to recover damages for alleged false representations made by defendant on leasing a house to plaintiff as to the relative capacity of, and quantity of coal required to run the furnace therein, plaintiff's evidence tended to establish the false representations, that defendant knew them to be false, and made them with intent to induce plaintiff to enter into the lease. It appeared that plaintiff's term commenced in mid-winter; that he immediately, after taking possession, discovered that the furnace would not heat the house, and had several talks with defendant upon the subject, in which he stated he should hold the latter responsible. He continued in possession and paid the rent as it fell due. *Held*, that plaintiff had the right to continue to occupy the premises and demand the damages suffered through defendant's fraud, which were the difference in the rental value of the premises as they were and as they would have been if as represented; that plaintiff's payment of the rent did not raise the presumption of an intent to waive the fraud or the right to such damages. *Id.*

6. Where the consent of a parent, entitled to and who is receiving the services of a daughter, to dispense with such services is obtained by fraud, it is void, and furnishes no defense to an action by the parent against the perpetrator of the fraud for damages resulting from the loss of service. *Lancier v. Fritcher.* 239

FRAUDULENT CONVEYANCES.

In an action to have an assignment, executed by defendant G., of certain judgments in his favor against the other defendants, set aside as fraudulent, and to compel a reassignment thereof to plaintiff, it appeared that the judgments were upon a claim of plaintiff, who, as he testified, being a non-resident, transferred the claim to G., who was irresponsible, for a nominal consideration to avoid giving security for costs. G. transferred the judgments to one who purchased as agent for the other defendants. In the action brought by G., the plaintiff here testified that he made the assignment to G. *bona fide* and absolutely. *Held*, that plaintiff was estopped from denying that the claim was the absolute property of G. *Anthony v. Wise.* 662

GIFTS.

The English doctrine of *cy pres*, which upholds gifts for charitable purposes when no beneficiary is named, has no place in the jurisprudence of this state. *Tilden v. Green.* 29

HEALTH.

See QUARANTINE

HIGHWAYS.

1. The right of an owner of a lot, abutting on a public street in a city to use and enjoy the light, air and access afforded by the street, is an appurtenance of his lot and property, for which, if taken for purposes inconsistent with street uses, compensation must be made, and if not taken but injured by such uses, the damages sustained may be recovered. *Hughes v. Met. E. R. Co.* 14

2. This right does not originate in a grant, and so its existence need not be established by conveyance in specific terms, nor by adverse possession; it arises by operation of law from contiguity, and its existence is presumed. *Id.*

3. The use of a city street by an elevated railroad is a use inconsistent for the purposes for which such streets are designed. *Id.*
4. The term "abutting lot" means one bounded on the side of a public street, in the bed or soil of which the owner of the lot has no title, interest or private rights, except such as are incident to a lot so situated. *Id.*
5. *It seems*, the presumption existing in favor of an abutting lot owner may be rebutted by showing that the rights have been parted with in any of the modes by which incorporeal hereditaments may be transferred, surrendered or lost. *Id.*
6. The burden of rebutting such presumption, however, is on the party who claims to have acquired such right. *Id.*
7. In an action to recover damages for injuries to plaintiff's premises caused by the construction and maintenance of an elevated railroad on a street in front thereof, it appeared that the premises in question extended from the said street to another street in the rear and were covered by a single brick building. Formerly it consisted of two lots, having different owners; they were conveyed to one person in 1825, before defendant's road was authorized to be built, and since then have been conveyed and occupied as one lot. There was no evidence that portions of the premises fronting on each street were occupied separately. *Held*, that plaintiff was, as abutting owner, entitled to recover his damages for injuries to the whole premises considered as a single lot; that while the fact that the premises were accessible to persons, property, light and air from both streets was important as bearing on the extent of the injuries, it did not preclude the recovery of any damages for injuries to that portion on another street. *Stevens v. N. Y. E. R. R. Co.* 95
8. The owners of lots abutting on a city street have, although the fee thereof is in the municipality, certain rights and privileges therein, in the nature of easements, which constitute property, and of which they may not be deprived without just compensation. (State Const. art. 1, § 6.) *Egerer v. N. Y. C. & H. R. R. Co.* 108
9. While, therefore, the legislature may direct the closing of a street and may empower the municipality to discontinue its use as such, this power is subject to the constitutional prohibition, and it may not be exercised so as to deprive an abutting owner of the access to his premises furnished by the street, without making compensation; at least unless there is provided or left for him other means of access. *Id.*
10. Under the act of 1880 (Chap. 147, Laws of 1880), which permitted the defendant to agree with commissioners appointed by the act on behalf of the city of Rochester, upon a plan to elevate its tracks along and across the city streets and to close up streets, etc., a portion of a street upon which plaintiff's premises abutted was discontinued, and defendant having previously obtained title to the fee of the street, erected thereon an embankment about fourteen feet high, upon which it laid its tracks leaving a space between it and said premises so narrow as not to admit of the approach of a team and carriage to them. Plaintiff's premises were used and occupied as a hotel and boarding-house. In an action to recover damages, upon these facts appearing, the court directed a verdict for the defendant. *Held*, error; that the plaintiff established a right to recover, and the question of damages should have been submitted to the jury. *Id.*
11. While the public is entitled to have a street or highway remain in the condition in which it placed it, and whoever, without special authority, materially obstructs it or renders its use hazardous by doing anything upon, above or below the surface, is guilty of a nuisance, when it appears that the act was done with the consent of the proper officials, the rule of lia-

- bility is relaxed and rests upon and is limited by the ordinary principles governing actions of negligence. *Babbage v. Powers*. 281
12. One who receives a license to encroach upon a public street is held to an implied agreement to perform the act permitted with due care for the safety of the public. *Id.*
13. The license, however, relieves him from the imputation of trespassing in doing the act consented to and places him simply in the position of one liable for negligence in case of omission to perform such duty. *Id.*
14. Where a vault had been constructed, with knowledge of the city officials, under the sidewalk of a city street, in front of a block erected and used for business purposes, and had been used for nine years, *held*, consent to its construction was to be inferred from the acquiescence of the city officials having charge of the street and power to give such consent. *Id.*
15. In the absence of a statute regulating the subject, a written consent in such case is not requisite; a verbal one is sufficient. *Id.*
16. In an action to recover damages for injuries received by plaintiff from falling through into a vault constructed under the sidewalk in front of a block of stores belonging to plaintiff in the city of R., the following facts appeared: The vault was covered with flagstones forming the sidewalk; one of these gave way as plaintiff, a heavy man, stepped upon it, and he fell through into the vault. It was not shown when this flag was broken, or whether it was defective. No negligence on the part of defendant or his grantor in constructing or maintaining the sidewalk was claimed further than was inferable from the accident itself. The vault was so constructed under the sidewalk with full knowledge upon the part of the proper city officials and in accordance with the common custom in the erection of business blocks in the city, and had been in use over nine years. *Held*, that plaintiff was properly nonsuited; that consent to the construction of the vault was to be inferred, and that, therefore, defendant could not be made liable as a trespasser, and no negligence on his part was proved. *Id.*
17. An elevated railroad erected in a city street, the right to construct and operate which has not been obtained by purchase from the abutting owners, or by proceedings to condemn, is, as to them, an illegal structure, and a continuing trespass upon their rights, from the time it was built. *Thompson v. Manhattan R. Co.* 360
18. Such a trespass is an injury to the inheritance, and a person seized of an estate in remainder in premises abutting upon the street, may maintain an action for an injunction against the railroad company, "founded upon an injury done to the inheritance, notwithstanding an intervening estate for life." (Code Civ. Pro. §§ 1665, 1681.) *Id.*
19. The theory upon which an action at law may be supported against an elevated railroad company by an abutting owner upon a street through which it runs, is that it is in such sense a trespasser or wrong-doer as to be liable to such owner for all the injuries resulting proximately from the wrongful act of maintaining and operating its road. *Moore v. N. Y. E. R. Co.* 523
20. The continued invasion of the privacy of the occupant of a building, where it has the effect to reduce the rental value is such an injury, and for the damages so resulting the company is liable. *Id.*
21. While the looking in at the windows of a dwelling, by the patrons and employes of an elevated railroad company, from its platform and the stairs leading to the same, is not the act of said company, as the latter furnishes the means and opportunity and by its invitation and procurement for

the purpose of its business, brings those persons where they can thus invade the privacy of said dwelling, it is liable for the damages thus occasioned. *Id.*

22. An abutting owner's private rights in a street may be lost in case their existence is denied, and they are exclusively possessed for more than twenty years by one claiming the fee of the street. *Woodruff v. Paddock.* 618

23. While, for land taken by an elevated railroad company, the full market value must be paid without deduction for benefits, in considering the question as to damages caused by the road to lands not taken, or to the property rights of an abutting owner in the streets through which its road runs, its advantages and disadvantages, benefits and injuries must be considered, and if the benefits equal or exceed the injuries, no damages can be awarded. *Odell v. N. Y. E. R. R. Co.* 690

See STREETS.

HUSBAND AND WIFE.

1. In an action for a separation the following facts appeared: The parties were married in this state in 1879; they lived together until in April, 1880, when defendant refused to permit plaintiff to live with him unless she would give up all intercourse with her mother; no reason was disclosed for imposing such condition, and plaintiff declining to accede to it, they did not thereafter live together. In 1882, defendant removed to Minnesota; before he left, plaintiff offered unconditionally in good faith to live with him; this he refused. He procured a divorce in Minnesota from plaintiff on the ground of desertion; she was personally served out of that state with the summons and complaint in the divorce suit. The judgment-roll therein was offered in evidence and excluded. *Held*, no error. *Williams v. Williams.* 193

2. The court found as a fact that defendant had abandoned plaintiff,

and rendered judgment as prayed for in the complaint. *Held*, no error; that defendant had no cause of action in this state against plaintiff for desertion; that plaintiff's act in leaving him was not voluntary, and upon her offer to return unconditionally, defendant was not justified in refusing to receive her; that plaintiff, being legally the wife of defendant within this state, must be considered as legally entitled to all the rights flowing from that relation under the Constitution and laws of the state and of the United States. *Id.*

3. The provision of the act in relation to married women (Chap. 90, Laws of 1860, as amended by chap. 172, Laws of 1862), making the property a married woman "acquires by her trade, business, labor or services, carried on or performed on her sole and separate account," her separate property, does not apply to labor performed by her for her husband, and she cannot make a binding contract with him for her services, having no connection with a separate business and estate, although the same are to be rendered outside of her household duties. While he cannot require her to perform services for him outside of the household, such services as she does render, whether within or without the strict line of her duty, belong to him, and a promise to pay therefor is simply a promise to make her a gift, and so is not enforceable. *Blaechinska v. H. M. & Home.* 497

See DIVORCE.

INDICTMENT.

Where an indictment under the provision of the Penal Code (§ 441), declaring that a non-resident who "plants oysters in the waters of this state, without the consent of the owner of the same, or of the shore, or gathers oysters * * * in any such waters on his own account or for his own benefit or the benefit of a non-resident employer," shall be guilty of a misdemeanor, charged that defendant at a time

specified, he then being a non-resident, planted oysters in waters of the state without the consent of the owners, but omitted to aver that this was done for his own benefit or the benefit of a non-resident employer, *held*, that the indictment failed to state facts constituting an offense; and that a demurrer thereto on that ground was improperly overruled. *People v. Lowndes*. 455

INFANTS.

Statutes providing the procedure for assessing and collecting taxes, for the sale of land for their non-payment, and for the redemption of lands sold for unpaid taxes, are applicable to infants and persons under disabilities, unless they are excepted from the operation of the act. *Lery v. Newman*. 11

INJUNCTION.

1. Where a manufacturer has invented a new name and applied it to an article manufactured by him to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, grade or characteristics, but is arbitrary or fanciful, he is entitled to be protected by injunction in the exclusive use of the name as a trademark. *Waterman v. Shipman*. 801
2. The use of the name by another manufacturer tends to deceive purchasers, and even if he had no actual intent to deceive, the courts are authorized to interfere, both to protect the private right of the manufacturer who invented it and the public interests. *Id.*
3. An elevated railroad erected in a city street, without consent of the abutting owner, is an injury to the inheritance, and a person seized of an estate in remainder in premises abutting upon the street, may maintain an action for an injunction against the railroad company, "founded upon an injury done to the inheritance, notwithstanding an intervening estate for life."

(Code Civ. Pro. §§ 1665, 1681.)
Thompson v. Manhattan R. Co. 860

— In action to restrain defendant from operating an elevated railroad in a street in front of plaintiff's premises, he is entitled to recover a sum awarded for damages to the fee as a condition for denial of the injunction.

See Hughes v. M. E. R. Co. 14

— Action at suit of a taxpayer is maintainable to restrain city officials from employing in a position where a civil service is required, one who has not passed the requisite examination.

See Peck v. Belknap. 394

See WATER-WORKS COMPANIES.

INSURANCE CORPORATIONS.

Plaintiff, an insurance company, entered into a contract with defendants to act as its agents in procuring insurance, and agreed to pay them thirty per cent of the premiums received on the policies obtained. Defendants induced H. & Co. to take out policies in plaintiff's company, and they were paid their percentage of the premiums. Before these policies expired, defendants' contract with plaintiff came to an end, and H. & Co., having been induced by defendants to insure in another company for which they had become agents, requested plaintiff to cancel their policies, which it did, and as provided by said policies returned to H. & Co. the premium unearned. *Held*, that plaintiff was entitled to recover of defendants the percentage received by them upon the amount of premiums so refunded; that although defendants' agency had ceased, they were not at liberty to defeat the purpose or duration of the contracts of insurance to the prejudice of plaintiff, and retain all the fruits thereof received by them. *Am. S. B. Ins. Co. v. Anderson*. 134

INSURANCE (FIRE).

1. It seems a director of a fire insurance company, or a member of its executive committee has no right

to approve of his own application for a policy in such company. *Prutt v. D. H. M. F. Ins. Co.*, 206

2. An officer of such a company, however, is not debarred from making application for insurance, and if his application is accepted by another officer having authority to accept applications, the company is bound. *Id.*

3. The officers of a corporation organized under the act providing "for the formation of county co-operative insurance companies" (Chap. 362, Laws of 1880, amended by chap. 171, Laws of 1881), have the same power to waive defects or ratify invalid policies as officers in a stock insurance company. *Id.*

4. Where insurance is made upon different kinds of property, each separately valued, the contract is severable, even if but one premium is paid, and the amount insured is the sum total of the valuations. *Id.*

5. Plaintiff, who was secretary of defendant, a corporation organized under said act, presented a written application to it, signed by him, for insurance on certain property. The application contained a clause by which the plaintiff agreed to pay a sum specified, and such further sums as he should be required to pay under its rules and by-laws. The application was approved by indorsement thereon, made by an officer of the company authorized to approve applications, and the premium specified was paid by plaintiff. The application was presented to and approved by the executive committee at its next meeting, as prescribed by the by-laws, and it was in various ways recognized by the company. *Held*, that plaintiff was, by the approval and payment, insured until notice to the contrary was given to him. *Id.*

6. By the by-laws of the company its policies were required to be signed by its president, or in his absence by the vice-president, and to be countersigned by the secretary. Plaintiff, pursuant to his application, filled out a blank policy,

which had been signed by the vice-president. It contained a clause not permitted by the custom of the company. *Held*, that conceding the policy to be invalid, it did not affect the validity of the contract made by the application and approval; but that the policy was not rendered invalid by the fact that it was signed by plaintiff as secretary, as that is required both by the statute and defendant's by-laws; that it was not made void, but simply voidable, at the election of the company, by the fact that its terms had not been previously approved by some officer other than plaintiff; and as the evidence permitted the inference that the company, with full knowledge of the facts, ratified the policy, and no effort was made to avoid it until after the commencement of this action thereon, such efforts were ineffectual and the company was bound. *Id.*

7. A policy of fire insurance issued by defendant contained a clause that in case of disagreement as to amount of loss, the same shall be ascertained by two appraisers, the insured and defendant each selecting one, who were to select "a competent and disinterested umpire." The policy also contained a condition requiring proofs of loss to be furnished within sixty days after the fire, also a provision that the company should not be held to have waived any provision or condition of the policy or the forfeiture by any act, requirement or proceeding on its part relating to an appraisal. In an action upon the policy it appeared that the property insured was destroyed by fire October 15, 1887. Defendant was notified, and on October twenty-first its general agent and adjuster called on plaintiff; they not agreeing as to the amount of loss, entered into a written agreement appointing appraisers; the agent at the time stated to plaintiff that proofs of the loss need not be furnished as the damages would soon be settled. On November twenty-eighth the appraiser appointed by plaintiff declined to act. On December twenty-second plaintiff telegraphed L., the appraiser appointed by defendant,

that he had secured another appraiser. L. appointed December thirtieth for making an appraisal. At that date the name of N., the new appraiser, was inserted in the agreement by L. The two appraisers failed to agree, and G., as the jury found, refused to agree upon a "disinterested umpire." *Held*, that the condition as to proofs of loss was waived, and that plaintiff was entitled to recover. *Bishop v. Agricultural Ins. Co.* 488

8. The mere failure of a fire insurance company to respond to an application of insurance does not raise an inference that it has accepted it and insured the risk. *More v. N. Y. B. F. Ins. Co.* 537

9. To bind the company there must be actual acceptance. *Id.*

10. In an action upon an alleged parol contract of insurance it appeared that S., the general agent of defendant, sent blank applications to N., with instructions that in case he secured business for defendant to fill out an application and forward to him (S.). N., on May twelfth, as a result of negotiations with plaintiffs, filled out an application and forwarded it to S. Plaintiffs were informed by N. that he could not issue a policy, and before one could be issued the application would have to be approved by some other person. S., on receiving the application, wrote to N. that the risk being special he did not wish to write it without submitting it to the company. On the same day S. wrote defendant, stating the application and the nature of the risk. Defendant, on receipt, immediately replied, rejecting the application. Of this action S. neglected to notify plaintiffs or N. Plaintiffs, on May thirtieth, sent a check to N. for the premium agreed upon, which the latter received, but did not remit to S. or defendant, and it did not appear they had any knowledge of the payment. A day or two thereafter N. told plaintiffs that he had heard nothing from the company, and consequently it was all right, and they would get the policy in

a day or two. The property was destroyed by fire on June sixth. *Held*, that defendant was not liable; that N., having to plaintiffs' knowledge no authority to contract, could not bind defendant by acceptance of the premium or by his conclusion drawn from its failure to report its action upon the application. *Id.*

11. While a waiver of a condition of forfeiture contained in a policy of insurance need not be based upon a technical estoppel, in the absence of an express waiver, some of the elements of an estoppel must exist; the insured must have been misled by some action of the company, which caused the omission, to comply with the condition, or it must have done something, after knowledge of a breach of the condition, which could only be done by virtue of the policy or required something from the assured which he was bound to do only at the request of the company under a valid policy or exercised a right which it had only by virtue of such policy. *Armstrong v. Agricultural Ins. Co.* 560

12. Defendant issued a policy of fire insurance to one B., payable to plaintiff as mortgagee "within sixty days after due notice and proof of the same made by the assured." The policy contained a provision to the effect that it should become void upon the commencement of proceedings to foreclose a mortgage upon the insured property, unless the written consent of the company was obtained. Plaintiff commenced an action to foreclose his mortgage without having contained such consent; subsequently he wrote to defendant that he had commenced such an action without discovering the clause requiring a consent, and asked for consent to continue the action. The letter was received by defendant, but no reply was made to it. A judgment of foreclosure and sale was entered, and thereafter the buildings insured were burned. B. having refused to make proofs of loss, they were made by plaintiff. Defendant on receipt declined to accept them upon the ground that they were

not made by the assured as required by the policy. Plaintiff thereupon again solicited B. to make the proofs, but he refused. Plaintiff then sent an affidavit of B.'s refusal. Defendant replied that this did not obviate the objection. In an action upon the policy, the court held that defendant had waived the forfeiture caused by the foreclosure by its failure to reply to plaintiff's letter notifying it thereof and asking consent; also by its demand for proofs of loss made by the owner of the property. *Held*, error; that defendant was under no obligation to reply to said letter, and its failure to reply did not authorize an inference of an intent to waive the condition, nor was it waived by the omission of the company to assert the forfeiture in connection with its objection to the proofs of loss. *Id.*

INSURANCE (MARINE).

1. Upon trial of an action upon a policy of marine insurance, one question was as to whether the vessel was lost before or after the policy expired. There was evidence authorizing the inference that it was before. The plaintiffs conceded that the question was one of fact, but defendant refused to go to the jury on that question and each party requested the court to direct a verdict in its favor. The court stated that neither party desired to have the facts submitted to the jury, and upon the inferences he was permitted to draw from the evidence, directed a verdict for plaintiff. *Held*, no error. *Reck v. Phenix Ins. Co.* 160

2. The policy contained a warranty that the vessel insured should not be loaded more than the "registered tonnage" with lead, marble, coal or iron on any one passage. *Held*, that the term "registered tonnage" had reference to that specified in the register under which the vessel sailed, and that upon an allegation of a breach of the warranty, the question was as to whether the cargo was of greater weight than that specified in the ships register. *Id.*

3. The vessel was a foreign one. *Held*, that the laws of measurement existing under acts of congress had no application, as the vessel under our law was not qualified to obtain an American register. *Id.*

4. The policy also contained a warranty that the vessel would not use certain ports specified, between certain dates. The written application for the policy bore date at a day between the dates specified, and stated that the ship was then at one of the prohibited ports. *Held*, that said warranty was waived; and so, that a breach thereof was not a defense to the action. *Id.*

5. The policy was issued to a firm "for account of whom it may concern." The ship was at the date of the policy owned by R., one of the firm. *Id.*

6. The insurance was effected for the benefit of plaintiff, a creditor of R. and a mortgagee of the ship. Defendant set up as a counter-claim certain notes made or indorsed by the firm. *Held*, that there was no legal basis for the counter-claim. *Id.*

JOINT DEFENDANTS.

1. A judgment against a plaintiff in favor of one defendant determines nothing between the latter and a co-defendant. *Ostrander v. Hart.* 406

2. While a judgment may determine the ultimate rights of defendants, as between themselves, where their interests in the subject-matter of the action are conflicting, such a determination may not be required or rendered in favor of one of the defendants, unless he has not only demanded it in his answer but has served a copy thereof upon the attorney of each defendant to be affected by the determination, appearing in the action and personally upon each defendant so affected who has not appeared. (Code Civ. Pro. § 521.) *Id.*

JUDGMENT.

1. A judgment against a plaintiff in favor of one defendant determines nothing between the latter and a co-defendant. *Ostrander v. Hart.* 406
2. While a judgment may determine the ultimate rights of defendants, as between themselves, where their interests in the subject-matter of the action are conflicting, such a determination may not be required or rendered in favor of one of the defendants, unless he has not only demanded it in his answer, but has served a copy thereof upon the attorney of each defendant to be affected by the determination, appearing in the action and personally upon each defendant so affected who has not appeared. (Code Civ. Pro. § 521.) *Id.*
3. In an action of ejectment, plaintiff claimed title under a deed from an assignee in bankruptcy of H., a former owner of the premises. Defendant P. claimed title under a sale on foreclosure of a mortgage executed by H. before the institution of the bankruptcy proceedings. It was claimed by plaintiff that, at the time of the foreclosure, the mortgage was paid. It appeared that S., the mortgagee brought an action to set aside the foreclosure proceedings and sale, to which action H., individually and as executor and trustee of his wife, who bid off the premises on the sale, and his assignee in bankruptcy were made parties; the assignee did not answer; H. answered, alleging that the premises were struck off to his wife in pursuance of an agreement between her and S. No copy of this answer was served on the assignee. On trial of that action, the court found that Mrs. H. advanced moneys and acquired rights under the sale which her estate was entitled to hold, although the claim secured by the mortgage was paid, and a decree was entered to the effect that the foreclosure was valid, and that S. was not entitled to have the same vacated. The trial court here decided that said judgment was a bar to this action; that the assignee, being a party,

was bound by the decision; and so that he had no title and could convey none to plaintiff. *Held*, error; that the judgment was neither conclusive as a bar nor as evidence against plaintiff, because no demand was made in the pleadings which called upon the assignee to defend his title as against H., and no adjudication was made between him and any party to the action. *Id.*

— *Where in action for conversion of personal property a conspiracy is charged, this is not necessarily a controlling element and does not require a verdict for or against all the defendants jointly.*

See Lockwood v. Bartlett. 340

See FOREIGN JUDGMENT

JURISDICTION.

1. A state may adjudge the status of its citizens towards a non-resident, and so long as the operation of such a judgment is kept within its own confines, other states must acquiesce, but it has no effect beyond the limits of the state. *Williams v. Williams.* 193
2. An action to determine whether a license to use or manufacture a patented article has been given does not arise "under the patent laws of the United States," and is not within the jurisdiction of the federal courts, when all the parties are citizens of the same state; but is cognizable in a state court. *Waterman v. Shipman.* 391
3. An action to foreclose a mechanic's lien was commenced in the County Court; the lien was for \$1,670.10. The complaint was amended on trial so as to demand only \$800. It was claimed by the owner that the court did not have jurisdiction. *Held*, that as there was nothing in the summons to show what the action was brought for, it being under the Code of Civil Procedure of the same form in all cases (§§ 416, 418), the court acquired jurisdiction when it was served and had power to amend the complaint. *Van Clief v. Van Vechten.* 571

JUSTICES OF THE PEACE.

1. Under the provisions of the Judiciary Act (§ 25, chap. 280, Laws of 1847), as amended in 1880 (§ 1 chap. 354, Laws of 1880), in reference to the removal of justices of the peace, which gives the court power in a proceeding for that purpose to certify and tax certain "reasonable expenses," the same to "be a charge against the city, town or village within which such justice of the peace," etc., resides, the court has no power, at least in a proceeding instituted after the passage of the amendatory act, to certify and tax counsel fees and disbursements, the power of the court is limited to an allowance of "the reasonable expenses of the referee." *In re King.* 602
2. Where, in such a proceeding, upon coming in of the report of the referee, the proceedings were dismissed, and upon application of both the complainant and respondent, the court certified and taxed the counsel fees and disbursements of both parties, *held*, that the portion of the order making these allowances was reviewable here on appeal by the city wherein the justice resided. *Id.*
3. Prior to the appeal all the items taxed were paid by direction of the common council of the city, except the sum taxed as the fees and disbursements of complainant's counsel. The appeal was "from the whole and every part of said order certifying and taxing the expenses of the reference herein." *Held*, that the notice of appeal was too broad. The order appealed from, therefore, modified by striking out the item so unpaid, but without costs of appeal. *Id.*

KNIGHTS OF LABOR.

1. An unincorporated association of seven or more members, organized as a local assembly of the organization known as "Knights of Labor," is not divested of title to property, contributed and owned by the associated members, by an annulment of its charter, and cannot be deprived thereof by any de-

cree of the General Assembly.
Wicks v. Monihan. 282

2. After a local assembly is thus deprived of its charter, an action may be maintained by its president or treasurer to recover an indebtedness due the association. (Code Civ. Pro. § 1919.) *Id.*

LANDLORD AND TENANT.

1. In an action to recover damages for loss of service, etc., of the plaintiff's minor daughter and the expense of medical attendance as the result of injuries to her from the falling of plaster from the ceiling of a hallway on the ground floor in a tenement-house owned by defendant, an upper floor of which was leased to and occupied by plaintiff with his family, which hallway was used in common by the tenants, the following facts appeared: Some time prior to the injury water had leaked through the plaster at the place where it fell, and the attention of H., from whom plaintiff rented and who collected the rents and attended to the repairs, had been called to the condition of the ceiling and to the danger that the plaster would fall, and he promised to have it repaired, but had failed to do so. *Held*, that defendant owed to his tenants the duty of exercising reasonable care in keeping the hallway in suitable repair and condition for their use; that the knowledge of H. as to the condition of the ceiling was, as between plaintiff and defendant, sufficient to charge the latter with notice; that it was a question for the jury whether the falling of the plaster was reasonably to be apprehended, and so as to whether defendant was chargeable with negligence. *Dollard v. Roberts.* 269

2. Also *held*, the fact that plaintiff and his daughter had knowledge of the condition of the ceiling and may have apprehended that the plaster would fall, did not necessarily charge either of them with contributory negligence in passing under it; that while the duty was imposed upon her of using

due care to avoid danger, it could not be said as matter of law that she failed in that respect by not constantly having in mind the condition of the ceiling when passing through the hallway, as she was obliged to do in going to and fro.

Id.

3. At the time of the injuries plaintiff's daughter was between thirteen and fourteen years of age, and was accustomed to perform services in doing housework. Defendant's counsel asked the court to charge the jury that if plaintiff failed to prove the value of the time lost or facts on which an estimate of such value could be founded, only nominal damages for that item could be given. This request was refused, and the court charged that if the jury found plaintiff was entitled to recover, he was entitled to recover not only for loss of service, the result of the injury, up to the time of trial, but also for prospective loss during the child's minority, and also for expenses actually and necessarily incurred, or which would be immediately necessary in consequence of the injury in the care and cure of the child. *Held*, no error. *Id.*

LEGISLATION.

1. • *It seems* that under the provisions of the act of 1842 (Chap. 306, Laws of 1842), requiring the secretary of state when an act as published in the session laws is certified "as having been passed by the assent of two-thirds of the members elected to each house" to state in connection with it as published in the session laws that it was passed "by a two-thirds vote" and that this statement shall be presumptive evidence that the bill was certified as having been so passed, the presumption thus created may be overcome by the production of the original certificate showing it was not so passed. *Rumsey v. N. Y. & N. E. R. R. Co.* 88
2. But while under the Revised Statutes (1 R. S. 156, § 3), no act shall be deemed to have been passed by a two-thirds vote unless so certified by the presiding officer of each

house, a defective certificate which fails to state either way, *i. e.*, as to whether or not the act was passed by a two-thirds vote, is not conclusive to overcome the presumption created by the statement of the secretary in the session laws.

Id.

3. In such case the journal of the house whose presiding officer has made the defective certificate may be resorted to for the purpose of determining the fact. *Id.*
4. *It seems* it would not be proper to go back of the certificate, if in due form, for the purpose of impeaching it. *Id.*

LEGISLATURE.

It seems the legislature has power to discriminate between residents and non-residents in favor of the former, in regard to its waters, the common property of the people of the state. *People v. Lowndes.* 455

See CONSTITUTIONAL LAW.

LIEN.

1. Under the provisions of the act of 1850 (Chap. 295, Laws of 1850) and the similar provision of the Code of Civil Procedure (§ 1880), providing that after one year from the death of a party against whom in his life-time a final money judgment had been rendered, the same "may be enforced by execution against any property upon which it is a lien," with like effect as if the judgment debtor was still living, no distinction is made between judgments upon sole, joint, or joint and several contracts, and the land of a deceased surety, against whom, as surety, a judgment has been recovered, and has become a lien upon said land in his life-time, is not excepted, and is not relieved from the lien by his death. *Baskin v. Huntington.* 313
2. Where, therefore, prior to the death of one of the makers of a joint and several promissory note, who executed it as surety, judgment had been recovered against him thereon, and had become a

lien upon his real estate, *held*, that the lien of the judgment was not discharged by his death, and was enforceable by execution issued as prescribed by the Code of Civil Procedure (§§ 1379, 1380, 1391); and this, although the judgment was recovered and the surety died before the going into effect of the provision of the Code (§ 758, as amended in 1877) declaring that the estate of a person jointly liable with others upon contract shall not be discharged by his death. *Id.*

See MECHANIC'S LIEN.
MORTGAGE.

LIMITATION OF ACTIONS.

In an action of ejectment it appeared that M., one of the heirs of R. under whom plaintiffs claimed, was at the time of his death and at the time of her death, which occurred in 1852, a married woman. She died leaving two children, both of age. Her husband died in February, 1854. From 1823 to the death of M. the premises were held adversely to her by those under whom defendants claim. *Held*, that action should have been brought within ten years after the death of the husband, and not having been brought within that period was barred by the Statute of Limitations. (Code Pro. § 88.) *Dodge v. Gallatin.* 117

LODGES.

1. No person, corporation or association, authorized to acquire and hold property, can be divested of it by the fiat of any other organization, or in any way without its consent, unless by due process of law. *Wicks v. Monihan.* 232
2. An unincorporated association of seven or more members, organized as a local assembly of the organization known as "Knights of Labor," is not divested of title to property, contributed and owned by the associated members, by an annulment of its charter, and cannot be deprived thereof by any decree of the General Assembly. *Id.*

3. After a local assembly is thus deprived of its charter an action may be maintained by its president or treasurer to recover an indebtedness due the association. (Code Civ. Pro. § 1919.) *Id.*
4. The distinction between such a case and that where a member of a club or voluntary association, in which the rights of the individual members are fixed by contract, has been expelled for violation of rules, pointed out. *Id.*

MALPRACTICE.

1. A physician and surgeon engages to bring to the treatment of his patient, care, skill and knowledge, and while, when exercising these, he is not responsible for mere errors in judgment, he is chargeable with knowledge of the probable consequence of an injury, or of neglect in its treatment, or unskillful treatment. *DuBois v. Decker.* 325
2. When a liability for negligence or malpractice is established, proof that the patient, after the liability was incurred, disobeyed the orders of the physician and so aggravated the injury, does not discharge the liability; it simply goes in mitigation of damages. *Id.*
3. Where an indigent person, having met with an accident, was taken to an alms-house, and was treated and attended there by a physician employed and paid by the public, *held*, that it was no defense, in an action for malpractice, that he was not employed by, and that there was no contract relations between him and plaintiff. *Id.*
4. *It seems*, the fact that a physician or surgeon renders his services gratuitously does not absolve him from the duty to exercise reasonable and ordinary care, skill and diligence. *Id.*

MANUFACTURING CORPORATIONS.

1. In an action by a creditor of a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848), against its trus-

tees to enforce the liability imposed by said act (§ 12), because of a failure to file an annual report in January, 1887, L., one of the defendants, claimed that he was not a trustee at that time. It appeared that L. was elected in 1880, and that no subsequent election was held; he testified that after the expiration of a year from his election he had nothing to do with its affairs, except to perform duties as foreman in its shop; that he never attended or was notified to attend any meeting of the trustees, and was never consulted by its officers. It appeared, however, that in December, 1886, in opposition to an application to the attorney-general to bring an action to dissolve the corporation, L. made and read an affidavit in which he stated that he was a trustee and referred to the others as his co-trustees; he reiterated this statement in an affidavit thereafter made to oppose the appointment of a receiver. L. testified in regard to these affidavits that he did not understand when he made them that he was making a statement that he was then a trustee, but supposed he had stated he was once a trustee. *Held*, that the question was one of fact and having been found against the defendant below, it was not reviewable here. *First Nat. Bank v. Lamon*. 366

2. The claim of the plaintiff was upon notes given by the corporation in September and October, 1886, which did not mature until after January 20, 1887. The corporation stopped work in its shops and discharged its employes about December 15, 1886. About that time it borrowed a large sum of money giving a mortgage upon its property to secure it. L. testified that it was then solvent. The application to the attorney-general was made December 29, 1886, the ground of which did not appear. The action was commenced by him January 15, 1887. An order to show cause why a receiver should not be appointed was granted January 18 and a receiver was appointed March 7, 1887. The bringing of the action and the appointment of a receiver were opposed by two out of four trustees. *Held*,

that the trustees were not, under the circumstances, relieved from the duty of filing the report in question. *Id.*

MARRIED WOMEN.

1. The provision of the act in relation to married women (Chap. 90, Laws of 1860, as amended by chap. 172, Laws of 1862), making the property a married woman "acquires by her trade, business, labor or services, carried on or performed on her sole and separate account," her separate property, does not apply to labor performed by her for her husband, and she cannot make a binding contract with him for her services having no connection with a separate business and estate, although the same are to be rendered outside of her household duties. While he cannot require her to perform services for him outside of the household, such services as she does render, whether within or without the strict line of her duty, belong to him, and a promise to pay therefor is simply a promise to make her a gift, and so is not enforceable. *Blaechinska v. Howard Mission, etc.* 497
2. In an action by a married woman to recover damages for injuries sustained through the alleged negligence of defendant, the plaintiff was permitted to testify, under objection, that before the accident she did the household work and worked for her husband as a seamstress, receiving from him a weekly salary, but because of the injury was no longer able to do this work. The court charged that if plaintiff was entitled to recover she could recover for the loss of wages she had sustained. *Held*, error; that plaintiff could recover actual damages only; and that the consequential damages for loss of her services, both in the house and as seamstress, could be recovered only in a separate action brought by her husband in his own name. *Id.*

MASTER AND SERVANT.

1. Where, in an action by an employe against a railroad company

to recover damages for injuries sustained by plaintiff when engaged in coupling two cars, occasioned by the overlapping of the dead-woods of the cars, defendant claimed that plaintiff had full knowledge of and took the chances of the danger, and gave evidence to the effect that it used on its road different kinds of cars, some without any dead-woods, and that switchmen in its employ had frequently to make couplings of cars, the dead-woods of which overlapped, *held*, that the admission of testimony showing that similar accidents had occurred on defendant's road was error. *Dye v. D., L. & W. R. R. Co.* 671

2. Plaintiff, a laborer in defendant's employ, was engaged in shoveling ashes from a pit between the rails. In attempting to get out of the pit as a locomotive approached, he was struck by it and injured. Near the pit was a water-plug so arranged that a locomotive, discharging ashes into the pit, could at the same time take water. The court submitted the question to the jury as to whether the relative position of the water-plug and the stopping place on the ash-pit was an improper and negligent construction. *Held*, error. *Reichel v. N. Y. C. & H. R. R. R. Co.* 682

3. Defendant provided two employes for locomotives running to the ash-pit and water-plug. *Held*, that negligence could not be imputed to it from the fact that but one of these employes was on the locomotive at the time of the accident, and that a refusal to so charge was error. *Id.*

MECHANICS' LIEN LAW.

1. Under the Mechanics' Lien Law of 1885 (Chap. 342, Laws of 1885), the filing of the prescribed notice originates the lien, and until this is done the laborer or material man has no preferential right to be paid out of the sum due the contractor from the owner of the building. If, before notice is filed, the contractor assigns to a creditor in payment of his debt, the whole or any portion of the moneys due or to

become due to him on his contract, the assignor is entitled to the same in preference to the lienor. *Stevens v. Ogden.* 182

2. The court may not extend purely statutory rights, such as are given by said act, beyond the terms of the statute creating them. *Id.*

3. Under the Mechanics' Lien Law of 1885 (Chap. 342, Laws of 1885), a lien filed attaches to the *locus in quo* to the extent of any sum then due, or which thereafter becomes due, pursuant to the contract under which the work is being done, or if the contractor abandons the contract without just cause and the owner completes the building in accordance with and under a provision of the contract permitting it, the lien attaches to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed. (FOLLETT, Ch. J., dissenting as to last proposition.) *Van Clief v. Van Vechten.* 571

4. In an action by a lienor who claims a sum due under the contract, he is under the same obligation to prove performance and to the same extent as would the contractor in an action by him. *Id.*

5. Where, therefore, the lienor, in an action to foreclose his lien, claims an installment due, and it appears that the contractor abandoned and willfully refused to perform the contract after due notice, the lienor must show performance of its stipulations entitling the contractor to the payment, without any omission so substantial in its character as to call for an allowance of damages if he had acted in good faith. *Id.*

6. In such an action it appeared that after the contractor abandoned the work, the owner, as authorized by the contract, completed the building herself, although not required so to do, and although she had threatened to cancel it. In her answer the owner asked to have the amount expended by her in completing the building to be allowed as a set-off or counter-claim. *Held* (FOLLETT, Ch. J., dissenting),

that it was to be presumed that the work so done by her was under the contract, and that it thus continued operative through her action; that the amount paid by her for this purpose was in legal effect paid for the contractor and the difference between the sum thus expended and the amount unpaid on the contract became due under it, and to the extent of that sum plaintiff's lien attached. *Id.*

7. The action to foreclose the lien was commenced in a County Court; the lien was for \$1,670.10. The complaint was amended on trial so as to demand only \$800. It was claimed by the owner that the court did not have jurisdiction. *Held*, that as there was nothing in the summons to show what the action was brought for, it being under the Code of Civil Procedure of the same form in all cases (§§ 416, 418), the court acquired jurisdiction when it was served and had power to amend the complaint. *Id.*

MISDEMEANOR.

1. Under the provision of the Penal Code (§ 441), declaring that a non-resident who "plants oysters in the waters of this state, without the consent of the owner of the same, or of the shore, or gathers oysters * * * in any such waters on his own account or for his own benefit or the benefit of a non-resident employer," shall be guilty of a misdemeanor, the concluding clause beginning "on his own account," applies alike to each of the two offenses created by the act, *i. e.*, to the planting as well as the gathering of oysters. *People v. Lowndes.* 455
2. Where an indictment under said provision charged that defendant at a time specified, he then being a non-resident, planted oysters in waters of the state without the consent of the owners, but omitted to aver that this was done for his own benefit or the benefit of a non-resident employer, *held*, that the indictment failed to state facts constituting an offense; and that a demurrer thereto on that ground was improperly overruled. *Id.*

MORTGAGE.

In an action to foreclose a mortgage, the defense to which was usury, it appeared that the agent of the mortgagee made the agreement for the loan apparently in his own name; he exacted as a condition of the loan the payment of a sum of money in excess of lawful interest. This sum was deducted from the amount agreed to be loaned, the mortgagor receiving the balance. There was no evidence that the agent retained this sum from moneys furnished by his principal, or that the latter advanced more than was received by the mortgagor; the mortgagee accepted the mortgage and received interest on the full amount until she assigned the same to plaintiff. *Held*, that the inference was permissible from the evidence, that the mortgagee in accepting the security knew it was for a larger sum than she had advanced; and so, in the absence of explanation, a finding was proper that she had notice that usury had been taken and that, in receiving the benefit thereof, she ratified the action of such agent; and, this having been found, that the mortgage was usurious and void. *Bliven v. Lydecker.* 102

See FORECLOSURE.

MOTIONS AND ORDERS.

1. An order, made upon petition authorized by statute, is conclusive as between the parties before the court, and can only be reviewed upon appeal. *Culross v. Gibbons.* 447
2. In an action under the General Railroad Act (§ 18, chap. 140, Laws of 1850, as amended by chap. 95, Laws of 1890), to recover the amount of an award for land taken for railroad purposes, it appeared that defendant was the successor of the P. & E. R. R. Co.; that the original order confirming the commissioners' report was delivered by the counsel for that company to the county clerk, and was copied at full length in a book indorsed P. & E. R. R. Co. orders, with the words "entered and recorded" at

the end thereof. Defendant claimed that the order should have been recorded in the book of deeds, and that the recording of the original order, instead of a certified copy thereof, was not in compliance with the law. *Held*, untenable; that there was a substantial compliance with the statute, and defendant, having caused the order to be recorded as it was, it would not be permitted to object. *Morgan v. N. Y. & Mass. R. Co.* 692

MUNICIPAL CORPORATIONS.

1. In an action to recover damages for injuries received by falling on a sidewalk in one of defendant's streets, it appeared that about sixteen days before the accident there had been a heavy fall of snow and another about four days previous. Plaintiff claimed that her fall was caused by a ridge of snow and ice which extended along the center of the walk. Plaintiff's evidence was to the effect that the ridge was five or six inches high; that it was formed of snow, part of which fell during the first and part during the second storm, which was packed down and glazed with ice; that it was uneven and very slippery, and had been there about a week before plaintiff fell. The jury rendered a verdict for plaintiff. *Held*, no error; that the evidence was sufficient to charge defendant with negligence. *Keane v. Village of Waterford.* 188

2. Shortly after her fall, plaintiff was found to be suffering from a certain disease, which one of the physicians, called as a witness by defendant, testified that he had never known to be occasioned by a fall. Other physicians, who were called by plaintiff, testified that a fall, or an attempt to save one's self from a fall, might produce the disease. The court submitted to the jury the question whether the disease was occasioned by her fall. *Held*, no error. *Id.*

3. Where a vault had been constructed, with knowledge of the city officials, under the sidewalk of a city street, in front of a block erected and used for business purposes, and had been used for nine

years, *held*, consent to its construction was to be inferred from the acquiescence of the city officials having charge of the street and power to give such consent. *Babbage v. Powers.* 281

4. In the absence of a statute regulating the subject, a written consent in such case is not requisite; a verbal one is sufficient. *Id.*

5. In an action to recover damages for injuries received by plaintiff from falling through into a vault constructed under a sidewalk in front of a block of stores belonging to plaintiff in the city of R., the following facts appeared: The vault was covered with flagstones forming the sidewalk; one of these gave way as plaintiff, a heavy man, stepped upon it, and he fell through into the vault. It was not shown when this flag was broken, or whether it was defective. No negligence on the part of defendant or his grantor in constructing or maintaining the sidewalk was claimed further than was inferable from the accident itself. The vault was so constructed under the sidewalk with full knowledge upon the part of the proper city officials and in accordance with the common custom in the erection of business blocks in the city, and had been in use over nine years. *Held*, that plaintiff was properly nonsuited; that consent to the construction of the vault was to be inferred, and that, therefore, defendant could not be made liable as a trespasser, and no negligence on his part was proved. *Id.*

6. A disqualification, under the Civil Service Law, for an appointment in the public service of a city, applies not only to the individual who has not passed the requisite examination, but also to the city itself; it cannot employ, or receive into its service, a person not eligible under the law. *Peck v. Belknap.* 394

7. An action is maintainable, at the suit of a taxpayer, against city officials, restraining them from entering into a contract of employment, in a position where a civil service examination is required,

with one who has not passed the examination, or to restrain the payment of the salary of such an employe out of the funds of the city. (Code Civ. Pro. § 1925; chap. 673, Laws of 1887.) *Id.*

8. It is not a defense to such an action that an employment by the city of some person for the purpose specified is proper and lawful, and that the compensation agreed to be paid was not extravagant. *Id.*

9. Where an appointment is to a position covered by the regulations for admission into the service of the city by its mayor, and approved by the civil service commission, the relation to the city of the appointee cannot be changed into that of an independent contractor by the execution of a formal contract between them, setting forth the specific duties he is to perform. *Id.*

10. Plaintiff fell upon new ice formed the night before over an old accumulation of ice and snow upon a sidewalk in one of defendant's streets, which had been negligently constructed, so as to have too great a slope toward the street. *Held*, in an action to recover damages, that in the absence of evidence showing that the slope of the walk was a concurring cause of the fall, without which it would not have happened, plaintiff was not entitled to recover. *Ayres v. Village of Hammondsport.* 665

11. While, when in an action against a railroad or municipal corporation to recover damages for injuries alleged to have been caused by defendant's negligence, it is important to show that defendant had notice of the dangerous character of the defect which caused the injury, testimony is competent to prove other similar accidents, such evidence is not competent where it can have no bearing upon the issues presented. *Dye v. D., L. & W. R. R. Co.* 671

See BROOKLYN (CITY OF).
BUFFALO (CITY OF).
NEW YORK (CITY OF).
ROCHESTER (CITY OF).

NATIONAL BANKS.

1. Inasmuch as no penalty is imposed either upon the bank or the borrower by the National Banking Act (U. S. R. S. § 5201) for a violation of the provision thereof prohibiting a national bank from making any loan or discount on the security of the shares of its own capital stock, except as specified, such violation may not be urged against the validity of the transaction by anyone except the government; at least, unless the objection was raised before the contract was executed, or while the security was in the hands of the bank. *Walden Nat. Bank v. Birch.* 221

2. In an action upon a bond given by one R. to plaintiff, a national bank, conditioned for the faithful performance by R. of his duties as plaintiff's cashier, these facts appeared: One T., who owned certain shares of plaintiff's stock and who was indebted to it, desiring to have his notes discounted to apply upon such indebtedness, under an arrangement made with R., as cashier, and for the purpose of securing the notes, and to avoid said prohibition, assigned his stock to R. individually, and the same was transferred to the latter on the books of the bank. The notes were thereupon indorsed by R., discounted by plaintiff and the proceeds applied in payment of T.'s indebtedness. The certificates of the stock were thereafter held by the bank, the dividends thereon being applied to pay the interest on the notes. Subsequently R. assigned the certificates to other banks as collateral security for loans made to him, which not having been paid, the collaterals were sold and R.'s indebtedness paid out of the proceeds. The notes so discounted by plaintiff were not paid. *Held*, that conceding the transaction was in violation of the said act, defendants could not avail themselves thereof as a defense; that R. took and held the stock in trust for the bank, and it was the equitable owner thereof, subject to the right of T. to redeem it; and that the transfer thereof by R. was a

violation of his duty; and so, a breach of the condition of the bond. *Id.*

8. The bank brought action and recovered judgment on the notes against R., as indorser. *Held*, that this was not a waiver of the right to sue him in tort for the misappropriation, and so, was not a waiver of the right to sue the sureties for the damages caused thereby; that the two remedies were not inconsistent, but concurrent. *Id.*

NAVIGATION.

1. As to whether the federal government can interfere with the right of the state to control and dispose of low flat lands covered with shallow water outside the navigable channel of a river, *quære*. *Rumsey v. N. Y. & N. E. R. R. Co.* 88
2. Where the federal government has not complained of such a grant and where it does not operate to interfere with navigation, no other party may be heard to complain. *Id.*

NEGLIGENCE.

1. Plaintiff, a man of seventy years, without anything in his hands to impede him, signalled a car which was passing at the usual speed on defendant's road on a crowded street; the brake being applied, the car slowed up but did not entirely stop; plaintiff caught hold of the rail of the rear platform with both hands and as he put his feet on the step the brake was relaxed, the car started with a sudden jerk, his feet were thereby thrown from the step, he was dragged along for a distance and was injured. In an action to recover damages, *held*, that the question of defendant's negligence and of plaintiff's contributory negligence were questions of fact, and so, were properly submitted to the jury; that the fact that the car was moving slowly when plaintiff attempted to get on did not establish contributory negligence as matter of law. *Morrison v. Bdway. & 7th Ave. R. R. Co* 166

2. In an action to recover damages for injuries received by falling on a sidewalk in one of defendant's streets, it appeared that about sixteen days before the accident there had been a heavy fall of snow and another about four days previous. Plaintiff claimed that her fall was caused by a ridge of snow and ice which extended along the center of the walk. Plaintiff's evidence was to the effect that the ridge was five or six inches high; that it was formed of snow, part of which fell during the first and part during the second storm, which was packed down and glazed with ice; that it was uneven and very slippery, and had been there about a week before plaintiff fell. The jury rendered a verdict for plaintiff. *Held*, no error; that the evidence was sufficient to charge defendant with negligence. *Keane v. Village of Waterford.* 188

3. Shortly after her fall, plaintiff was found to be suffering from a certain disease, which one of the physicians called as a witness by defendant testified that he had never known to be occasioned by a fall. Other physicians who were called by plaintiff testified that a fall or an attempt to save one's self from a fall might produce the disease. The court submitted to the jury the question whether the disease was occasioned by her fall. *Held*, no error. *Id.*
4. In an action to recover damages for loss of service, etc., of the plaintiff's minor daughter and the expense of medical attendance as the result of injuries to her from the falling of plaster from the ceiling of a hall-way on the ground floor in a tenement-house owned by defendant, an upper floor of which was leased to and occupied by plaintiff with his family, which hall-way was used in common by the tenants, the following facts appeared: Some time prior to the injury water had leaked through the plaster at the place where it fell, and the attention of H., from whom plaintiff rented and who collected the rents and attended to the repairs, had been called to the condition of the ceiling and to the danger that the plaster would fall,

and he promised to have it repaired, but had failed to do so. *Held*, that defendant owed to his tenants the duty of exercising reasonable care in keeping the hall-way in suitable repair and condition for their use; that the knowledge of H. as to the condition of the ceiling was, as between plaintiff and defendant, sufficient to charge the latter with notice; that it was a question for the jury whether the falling of the plaster was reasonably to be apprehended, and so as to whether defendant was chargeable with negligence. *Dollard v. Roberts.* 289

5. Also *held*, the fact that plaintiff and his daughter had knowledge of the condition of the ceiling and may have apprehended that the plaster would fall, did not necessarily charge either of them with contributory negligence in passing under it; that while the duty was imposed upon her of using due care to avoid danger, it could not be said as matter of law that she failed in that respect by not constantly having in mind the condition of the ceiling when passing through the hall-way, as she was obliged to do in going to and fro. *Id.*

6. At the time of the injuries plaintiff's daughter was between thirteen and fourteen years of age, and was accustomed to perform services in doing housework. Defendant's counsel asked the court to charge the jury that if plaintiff failed to prove the value of the time lost or facts on which an estimate of such value could be founded, only nominal damages for that item could be given. This request was refused, and the court charged that if the jury found plaintiff was entitled to recover, he was entitled to recover not only for loss of service, the result of the injury, up to the time of trial, but also for prospective loss during the child's minority, and also for expenses actually and necessarily incurred, or which would be immediately necessary in consequence of the injury in the care and cure of the child. *Held*, no error. *Id.*

7. While the public is entitled to have a street or highway remain

in the condition in which it placed it, and whoever, without special authority, materially obstructs it or renders its use hazardous by doing anything upon, above or below the surface, is guilty of a nuisance, when it appears that the act was done with the consent of the proper officials, the rule of liability is relaxed and rests upon and is limited by the ordinary principles governing actions of negligence. *Babbage v. Powers.* 281

8. One who receives a license to encroach upon a public street is held to an implied agreement to perform the act permitted with due care for the safety of the public. *Id.*

9. The license, however, relieves him from the imputation of trespass in doing the act consented to and places him simply in the position of one liable for negligence in case of omission to perform such duty. *Id.*

10. In an action to recover damages for injuries received by plaintiff from falling through into a vault constructed under the sidewalk in front of a block of stores belonging to plaintiff in the city of R., the following facts appeared: The vault was covered with flagstones forming the sidewalk; one of these gave way as plaintiff, a heavy man, stepped upon it, and he fell through into the vault. It was not shown when this flag was broken, or whether it was defective. No negligence on the part of defendant or his grantor in constructing or maintaining the sidewalk was claimed further than was inferable from the accident itself. The vault was so constructed under the sidewalk with full knowledge upon the part of the proper city officials and in accordance with the common custom in the erection of business blocks in the city, and had been in use over nine years. *Held*, that plaintiff was properly nonsuited; that consent to the construction of the vault was to be inferred, and that, therefore, defendant could not be made liable as a trespasser, and no negligence on his part was proved. *Id.*

11. A physician and surgeon engages to bring to the treatment of his patient, care, skill and knowledge, and while, when exercising these, he is not responsible for mere errors in judgment, he is chargeable with knowledge of the probable consequence of an injury, or of neglect in its treatment, or unskillful treatment. *DuBois v. Decker*. 325
12. When a liability for negligence or malpractice is established, proof that the patient, after the liability was incurred, disobeyed the orders of the physician and so aggravated the injury, does not discharge the liability; it simply goes in mitigation of damages. *Id.*
13. Where an indigent person having met with an accident, was taken to an alms-house, and was treated and attended there by a physician employed and paid by the public, *held*, that it was no defense, in an action for malpractice, that he was not employed by, and that there was no contract relations between, him and plaintiff. *Id.*
14. *It seems*, the fact that a physician or surgeon renders his services gratuitously does not absolve him from the duty to exercise reasonable and ordinary care, skill and diligence. *Id.*
15. Plaintiff, an employe of defendant, was struck by a dirt-plow which fell from a car, one of a train from which dirt and gravel was being removed by its use. Under the charge of the court, the jury were permitted to find from the fact that the accident occurred, without any evidence of negligent or unskillful construction of the plow, or of a failure to keep it in repair, that the falling of the plow was owing to the fault of defendant. *Held*, error. *De Van v. Penn. & N. Y. C. & R. R. Co.* 632
16. In an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, plaintiff may not support his own testimony, as to the effect of the injuries, by proof of declarations to the same effect made by him after the accident, and forming no part of the *res gestæ*, to persons other than a physician in attendance upon him professionally. *Kennedy v. R. C. & B. R. R. Co.* 654
17. *It seems*, the rule was different, prior to the passage of the statute allowing parties to be witnesses. *Id.*
18. *It seems* also, that evidence of involuntary exclamations, which are natural concomitants and manifestations of pain and suffering, are still admissible where they form part of the *res gestæ*. *Id.*
19. But complaints made which are so far detached from the occurrence as to admit of deliberate design, and of their being the product of a calculating policy on the part of the complainant, cannot properly be regarded as part of the *res gestæ*. *Id.*
20. Plaintiff fell upon new ice formed the night before over an old accumulation of ice and snow upon a sidewalk in one of defendant's streets, which had been negligently constructed, so as to have too great a slope toward the street. *Held*, in an action to recover damages, that in the absence of evidence showing that the slope of the walk was a concurring cause of the fall, without which it would not have happened, plaintiff was not entitled to recover. *Ayres v. Village of Hammondsport*. 665
21. In an action to recover damages for injuries received while crossing defendant's track, it appeared that plaintiff, before stepping upon the first track, looked both ways, but did not look again towards the west, from which direction he knew a train was due; he crossed the first and second tracks and walked east, between the second and third tracks, so near the latter that he was struck by said train. The rumble of the approaching train was distinctly heard by other people in the vicinity. *Held*, that plaintiff was guilty of contributory negligence. *Scott v. Pennsylvania R. R. Co.* 679
22. Plaintiff, a laborer in defendant's employ, was engaged in shoveling

ashes from a pit between the rails. In attempting to get out of the pit as a locomotive approached, he was struck by it and injured. Near the pit was a water-plug so arranged that a locomotive, discharging ashes into the pit, could at the same time take water. The court submitted the question to the jury as to whether the relative position of the water-plug and the stopping place on the ash-pit was an improper and negligent construction. *Held*, error. *Reichel v. N. Y. C. & H. R. R. Co.* 682

23. Defendant provided two employes for locomotives running to the ash-pit and water-plug. *Held*, that negligence could not be imputed to it from the fact that but one of these employes was on the locomotive at the time of the accident, and that a refusal to so charge was error. *Id.*

NEW YORK (CITY OF).

1. In February, 1807, R. made and published his will by which he devised all his residuary real estate of which he was then or might be seized and possessed of at the time of his death to C. At that time R. was the owner of certain lands in the city of New York, bounded easterly by the high-water mark of the Hudson river; he subsequently petitioned the common council for a grant of land under water in front of his uplands. Such a grant was executed and delivered in November, 1807. R. died in 1809 without republishing his will. In an action of ejectment brought to recover two lots, part of the lands covered by said grant, in which action defendants claimed title under said will, it appeared that in 1794 the board of aldermen of said city passed a resolution to grant the then owner of said uplands the water lots in front thereof. In 1797 the then owner petitioned said board for a grant so that he might build a bulkhead and fill in his water lots; this was referred to a committee, who reported in favor of a grant, which report was agreed to by the board. It did not appear that any conveyance was executed; but it

appeared that the petitioner, prior to 1799, took possession, docked out and filed in the lots and had the use of the property from that time. In 1798 the city presented a petition to the legislature setting forth, among other things, that it had lately directed a permanent street to be laid out at the extremity of its grants "already made and thereafter to be made" on said river, and asking authority to compel the proprietors of the lots fronting thereon to make the street. Thereupon an act was passed (Chap. 80, Laws of 1798), authorizing the city to lay out the street at the expense of the adjoining proprietors and requiring the proprietors of the uplands, who had not acquired title to the land under water, to fill up the space between their lots and said street. The act provided that upon their doing this they shall "be respectively entitled to become the owners of the said intervening space of ground in fee simple." The city accepted the act, and, in pursuance thereof, the then owner of the upland adjoining the land conveyed by said grant, filled in the space between his uplands and said street. *Held*, that these facts disclosed an equitable title in R. at the time of the execution of his will, which passed by the devise. *Dodge v. Gallatin.* 117

2. Exceptions were taken to the admission in evidence of petitions to the common council for the grant and of certain old maps and leases. It appeared that upon the death in 1825 of the then owner of the uplands he left a large landed estate, which for upwards of fifty years was under the management and control of his executor, who had an office as executor, and in a safe therein, kept the books and papers of the estate, including a large number of old deeds, leases and muniments of title, and among these the petitions, maps and leases were found. The fact that petitions by the parties were presented to the board of aldermen at the dates indicated appeared by a record of its proceedings. A careful examination, however, failed to find the petitions on file. *Held*,

that the papers were properly received as ancient writings, and the petitions as being the best evidence obtainable of the petitions presented to the board of aldermen. *Id.*

NON-RESIDENTS.

It seems the legislature has power to discriminate between residents and non-residents in favor of the former in regard to its waters, the common property of the people of the state. *People v. Lowndes.* 455

NOTICE.

In an action brought by plaintiffs to recover an amount due a firm upon a deposit account with defendant's bank, which plaintiffs claimed to have attached in an action against said firm, the sheriff, in attempting to levy, delivered to defendant's cashier a copy of the warrant; this showed that the action was against the firm. Upon it was indorsed a notice that by it the sheriff was commanded to attach all the property of L., one of the firm, within his county, and that by virtue thereof he attached any moneys due or belonging to L., or any of his property in its possession. *Held*, that the notice was insufficient to attach, and could not be made the foundation of a proceeding to divest the title of the firm to, any funds on deposit with defendant; that defendant could only look to the notice to ascertain the property levied on and was not bound to read the warrant with it; also, that the notice was insufficient to attach the interest of the partner named in the deposit, as it did not specify such an interest. *Hayden v. National Bank.* 146

NUISANCE.

1. While the public is entitled to have a street or highway remain in the condition in which it placed it, and whoever, without special authority, materially obstructs it, or renders its use hazardous by doing anything upon, above or below the surface, is guilty of a

nuisance, when it appears that the act was done with the consent of the proper officials, the rule of liability is relaxed and rests upon and is limited by the ordinary principles governing actions of negligence. *Babbage v. Powers.* 281

2. In an action to recover damages for injuries received by plaintiff from falling through into a vault constructed under the sidewalk in front of a block of stores belonging to plaintiff in the city of R., the following facts appeared: The vault was covered with flagstones forming the sidewalk; one of these gave way as plaintiff, a heavy man, stepped upon it, and he fell through into the vault. It was not shown when this flag was broken, or whether it was defective. No negligence on the part of defendant or his grantor in constructing or maintaining the sidewalk was claimed further than was inferable from the accident itself. The vault was so constructed under the sidewalk with full knowledge upon the part of the proper city officials and in accordance with the common custom in the erection of business blocks in the city, and had been in use over nine years. *Held*, that plaintiff was properly nonsuited; that consent to the construction of the vault was to be inferred, and that, therefore, defendant could not be made liable as a trespasser, and no negligence on his part was proved. *Id.*

OFFICE AND OFFICERS.

1. *It seems* a director of a fire insurance company, or a member of its executive committee, has no right to approve of his own application for a policy in such company. *Pratt v. D. H. M. F. Ins. Co.* 206

2. An officer of such a company, however, is not debarred from making application for insurance, and if his application is accepted by another officer having authority to accept applications, the company is bound. *Id.*

3. The officers of a corporation organized under the act providing

"for the formation of county co-operative insurance companies" (Chap. 362, Laws of 1880, amended by chap. 171, Laws of 1881), have the same power to waive defects or ratify invalid policies as officers in a stock insurance company. *Id.*

ORDER (FOR MONEY OR GOODS).

An order drawn by a building contractor in favor of a creditor, by its terms payable out of a sum due or to become due from the owner under his contract, when such order is given and accepted in payment of the debt, it operates as an assignment *pro tanto* of that fund. *Stevens v. Ogden.* 182

—Where parol evidence may be given of the contents of an order for the payment of a sum of money which is only collaterally in question. See *Daniels v. Smith* (Mem.). 696

OYSTERS.

1. Under the provision of the Penal Code (§ 441), declaring that a non-resident who "plants oysters in the waters of this state, without the consent of the owner of the same, or of the shore, or gathers oysters * * * in any such waters on his own account or for his own benefit or the benefit of a non-resident employer," shall be guilty of a misdemeanor, the concluding clause beginning "on his own account," applies alike to each of the two offenses created by the act, *i. e.*, to the planting as well as the gathering of oysters. *People v. Lonnides.* 455

2. Where an indictment under said provision charged that defendant at a time specified, he then being a non-resident, planted oysters in waters of the state without the consent of the owners, but omitted to aver that this was done for his own benefit or the benefit of a non-resident employer, *held*, that the indictment failed to state facts constituting an offense; and that a demurrer thereto on that ground was improperly overruled. *Id.*

PARENT AND CHILD.

1. Where the consent of a parent, entitled to and who is receiving the services of a daughter, to dispense with such services is obtained by fraud, it is void, and furnishes no defense to an action by the parent against the perpetrator of the fraud for damages resulting from the loss of service. *Lauryer v. Fritcher.* 239
2. In such a case where loss of service was shown, and it appeared that the daughter after being taken away from her father's house, was seduced by the defendant, *held*, that the jury had the right in their discretion to impose punitive as well as compensatory damages. *Id.*
3. In an action by a father to recover damages sustained by the unwarranted interference of defendant with plaintiff's right to the services of his daughter, the following facts appeared: Plaintiff's daughter, who was seventeen years of age, generally lived and performed services in her father's family. Defendant, who was a married man, fraudulently representing to plaintiff that he had a legal right to marry, obtained from plaintiff and his wife a consent in writing to his marriage to their daughter. Defendant then took her away from home, seduced her and, after cohabiting with her two nights, she, on discovering that his statement was false, took poison and died. *Held*, that plaintiff was entitled to maintain the action for the unlawful interference with plaintiff's right to the services of his daughter; and that the jury had a right, in their discretion, to impose punitive damages. *Id.*

PARTIES.

1. The will of F., after directing the payment of his debts, etc., by its terms gave all of his estate to his executors, *i. e.*, his wife and H., "to have and to hold the same to themselves, their heirs and assigns forever upon the uses and trusts following." The will then gave various legacies to the testator's

children; these were followed by a residuary clause by which he gave all the residue of his estate "after providing for the aforesaid bequests, * * * absolutely and forever" to his wife. "Full power and authority" was given to the "said trustees, executor and executrix * * * to sell any or all" of the real estate, "as they may deem best." The executors were appointed trustees and guardians of the children during their minority. H. omitted to qualify as executor, and letters testamentary were granted to the widow alone. *Steinhardt v. Cunningham*. 292

2. In an action to foreclose a mortgage on certain real estate of which F. died seized, the widow was made a party, but H. was not. Defendant, who acquired title under the foreclosure sale, contracted to sell the same to plaintiff. In an action to recover back moneys paid and expenditures under the contract, on the ground of defect in defendant's title, *held*, that no valid trust was created by the will; that the purposes of the testator could be accomplished through a trust power; that the trustees took no title to the real estate, but the same vested in the widow; and, therefore, that H. was not a necessary party to the foreclosure suit, and defendant acquired a good title under the sale. *Id.*

3. Upon the death of one of two joint contractors, the primary liability for a breach of the contract rests upon the survivor, and in order to maintain an action against him and the personal representatives of the decedent jointly, the complaint must allege that the latter is insolvent or unable to pay. *Barnes v. Brown*. 372

4. The A. & P. Telegraph Co. organized a department for the purpose of supplying newspapers with news transmitted by its wires; this department was entitled "The National Associated Press, James H. Goodsell, President." Subsequently, said Goodsell, the plaintiff herein, entered into a contract with said company, he contract-

ing, in the name so given to the department, to furnish news to be transmitted by it at prices named. Thereafter, said company assigned and transferred to defendant all of its property, business, rights and privileges, etc., the latter undertaking and assuming performance of the contract in question. *Held*, that plaintiff could maintain an action in his own name for a breach of the contract; that as the contracting company was not defrauded or misled by the use of the name adopted by plaintiff, neither it nor its assignee could avoid the contract because of such use. *Goodsell v. W. U. Tel. Co.* 480

5. An action to set aside as fraudulent an assignment for the benefit of creditors was brought by plaintiff on behalf of himself and other creditors who desired to join. Two attachment creditors whose claims were admitted by the inventory, were made defendants. They answered, admitting the allegations of the complaint as to fraud, and joined with the plaintiff in the action. The judgment sustained the assignment and required said creditors to turn over the property attached to the assignee. *Held*, that said creditors had the right to appeal. *Roberts v. Victor*. 585

PARTNERSHIP.

1. In an action for an accounting between partners one of the schedules of the account consisted of items claimed to have been paid by defendant for repairs to real estate purchased by the firm, but title to which was taken in the name of defendant. Defendant was asked if he paid the items in said schedule; this was excluded on plaintiff's objection. Previous to this it had been shown that the case had been tried partially before another referee, who died before the trial was completed; defendant testified that he had vouchers for the payments made by him which had been left with the former referee; that he had been informed by the person in charge of said referee's office that they had been transmitted to the new

referee, and that the latter had not been able to find them. *Held*, that the evidence was competent and its exclusion error. *Van Bokkelen v. Berdell*. 141

2. Plaintiff was asked and permitted to answer under objection and exception, as to what facts were shown upon the trial before the the former referee. He testified the facts shown were that defendant made a mortgage on said real estate, which was not recorded for a long time after. *Held*, that the evidence was incompetent, as it was plaintiff's conclusion as to what was proved before the former referee; that it was important, as it tended to show that defendant had encumbered the property, and so the error required a reversal. *Id.*

3. An action in equity for an accounting between copartners is an appropriate, if not an exclusive remedy to adjust and settle the partnership affairs. *Watts v. Adler*. 646

4. Although upon dissolution of a firm one of the copartners is alone authorized to liquidate the firm business, he may maintain an action for an accounting and thereby compel a copartner to pay over any balance that may be established against him, or in case of deficiency in firm assets, to contribute his proportion of what is required to discharge the debts of the firm. *Id.*

PATENT (FOR INVENTIONS).

1. An issue as to the existence of a license to use or manufacture a patented article is simply one as to the existence of a contract; it involves a question of title to property, as the exclusive privilege created by the issuing of a patent is property. *Waterman v. Shipman*. 301
2. An action, therefore, to determine whether a license has been given does not arise "under the patent laws of the United States," and is not within the jurisdiction of the federal courts, when all the parties

are citizens of the same state; but is cognizable in a state court. *Id.*

PATENT (FOR LANDS).

1. The act of 1850 (Chap. 283, Laws of 1850), which empowers the commissioners of the land office to grant to the proprietors of adjacent lands "so much of the lands under the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this state or proper for the purpose of beneficial enjoyment of the same by the adjacent owner," is one requiring the assent of two-thirds of the members of both houses of the legislature. (State Const. art. 1, § 9; 1 R. S. 156, § 2.) *Rumsey v. N. Y. & N. E. R. R. Co.* 88
2. The legislature had authority to confer such power upon the said commissioners. (Const. art. 5, §§ 5, 6.) *Id.*
3. Where the Federal Government has not complained of such a grant and where it does not operate to interfere with navigation, no other party may be heard to complain. *Id.*

4. The provision of the General Railroad Act of 1890 (Chap. 565, Laws of 1890), authorizing a railroad corporation to construct its road across or along any stream or water-course and removing the exception in the similar provision of the act of 1850 (Chap. 140, Laws of 1850), of the right to obstruct any navigable stream or lake, has no effect upon a patent for lands under the waters of a navigable stream issued by the state prior to the passage of said act of 1850, and so, does not divest the patentee of any rights acquired under his patent. *Id.*

PENAL CODE.

- § 441. *People v. Lowndes*. 455

PHYSICIAN AND SURGEON.

1. A physician and surgeon engages to bring to the treatment of his

patient, care, skill and knowledge, and while, when exercising these, he is not responsible for mere errors in judgment, he is chargeable with knowledge of the probable consequence of an injury, or of neglect in its treatment or unskillful treatment. *DuBois v. Decker.* 325

2. When a liability for negligence or malpractice is established, proof that the patient, after the liability was incurred, disobeyed the orders of the physician and so aggravated the injury, does not discharge the liability; it simply goes in mitigation of damages. *Id.*
3. Where an indigent person, having met with an accident, was taken to an alms-house, and was treated and attended there by a physician employed and paid by the public, *held*, that it was no defense, in an action for malpractice, that he was not employed by, and that there was no contract relations between, him and plaintiff. *Id.*
4. *It seems*, the fact that a physician or surgeon renders his services gratuitously does not absolve him from the duty to exercise reasonable and ordinary care, skill and diligence. *Id.*

PLEADING.

1. Upon the death of one of two joint contractors, the primary liability for a breach of the contract rests upon the survivor, and in order to maintain an action against him and the personal representatives of the decedent jointly, the complaint must allege that the latter is insolvent or unable to pay. *Barnes v. Brown.* 372
2. In an action brought by plaintiffs, as general creditors of defendant S., to set aside certain judgments confessed by her, together with executions issued thereon and levies made thereunder, as in violation of said act, the complaint alleged in substance that S., a few hours before she made an assignment, in contemplation thereof and for the purpose of giving preferences in fraud of the assignment, confessed the judgments in question; that immediately after

the entry thereof executions were issued upon them, which, just before the delivery of the assignment, were levied upon all her property, and that the same was not worth three times the amount of the judgments; that said executions were issued and levies made in contemplation of the assignment, and for the purpose of preferring the judgment creditors, in fraud of the assignment; also that the assignee, upon being requested, had refused to bring suit to set aside the judgment. From the assignment and the judgment-rolls, copies of which were annexed to the complaint, it appeared that the debts for which the judgments were confessed were preferred in the assignment, they being the only preferences, except wages, etc., of the employes of the assignor. Upon demurrer to the complaint, defendants claimed that, as plaintiffs were not judgment creditors, they had no standing in court to maintain the action. *Held*, untenable, as plaintiffs were not seeking to attack the assignment, but, as beneficiaries of the trust, were seeking to uphold and enforce it; that such an action was maintainable by any creditor, whether a judgment creditor or a creditor at large. *Spelman v. Freedman.* 421

3. Defendants, the judgment creditors, also claimed the complaint to be insufficient, as it did not allege that they knew S. intended to make an assignment. *Held*, untenable, as the complaint alleged that the acts of the judgment creditors, *i. e.*, the issuing of executions and the levies thereunder, as well as the acts of their debtor, were in contemplation, and in fraud, of the assignment. *Id.*
4. Facts material to a plaintiff's cause of action and essential to be proved to entitle him to a judgment must be pleaded. *Lent v. N. Y. & Mass. R. Co.* 504
5. In an action upon an alleged indebtedness an allegation in the complaint of non-payment is essential. *Id.*
6. This is not affected by the rule that payment must be pleaded as

an affirmative defense, and cannot be proved under the general issue, but the rule simply modifies the general rule of pleading so that the averment of payment is not put in issue by a general denial. *Id.*

7. To constitute a cause of action against a railroad company under the General Railroad Act (§ 18, chap. 140, Laws of 1850, as amended by chap. 198, Laws of 1876), to recover the amount of an award for land taken by it for railroad purposes, it is necessary that the final order confirming the award of the commissioners of appraisal, or a certified copy thereof, should be recorded in the county clerk's office. *Id.*
8. An allegation, therefore, in the complaint in such an action of such recording is essential, so also is an averment that the defendant has failed to pay the award or is indebted to plaintiffs therefor. *Id.*
9. The complaint in such an action alleged the incorporation of defendant, the presentation by it of a petition for the appointment of commissioners, their appointment and report of amount to be paid plaintiff, the confirmation thereof on defendant's motion, and that defendant subsequently appealed from said order to the General Term, where it was affirmed. Then followed a prayer for judgment for the amount of the award and costs. There was no allegation that defendant had failed or omitted to pay the award or was indebted to plaintiff. Defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action, and the demurrer was overruled. *Held*, error. *Id.*
10. The complaint did not expressly allege that the order confirming the report of the commissioners had been recorded as required by said act to create a debt against defendant. It did allege, however, that the order had been "entered," and the paragraph closed with this clause: "To which order or its record plaintiffs beg leave to refer." *Held*, that the

word "entered" was properly used as synonymous with "recorded;" and so, that the complaint in this respect was sufficient. *Id.*

11. Where in an equity action the defendant does not plead want of equitable jurisdiction or allege that plaintiff has an adequate remedy at law, he may not insist upon the trial that an action in equity will not lie. *Watts v. Adler.* 646

POWERS.

1. A certain designated beneficiary is essential to the creation of a valid testamentary trust, and a trust without a beneficiary who can claim its enforcement is void. The objection is not obviated by the creation of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain the object or objects of the power. *Tilden v. Green.* 29
2. So also, while under the Statute of Powers there may be a power of selection or exclusion with regard to the designated objects, the power of selection must be so defined that there are persons who can come into court and say they are embraced within the class, and demand the enforcement of the power. *Id.*

PRACTICE.

1. While a judgment may determine the ultimate rights of defendants, as between themselves, where their interests in the subject-matter of the action are conflicting, such a determination may not be required or rendered in favor of one of the defendants, unless he has not only demanded it in his answer, but has served a copy thereof upon the attorney of each defendant to be affected by the determination, appearing in the action and personally upon each defendant so affected who has not appeared. (Code Civ. Pro. § 521.) *Ostrander v. Hart.* 406

2. An omission to find facts claimed by the unsuccessful party to a suit to be warranted by the evidence, can only be taken advantage of by an exception to a refusal to so find, upon request duly made as required by the Code of Civil Procedure (§§ 993, 1023). *Id.*

3. Although a finding of fact by a referee is wholly unsustained by evidence, if not excepted to, no legal question is presented which the court may pass upon. *Daniels v. Smith.* 696

4. An exception in terms to the referee's conclusion of law cannot avail the party excepting, if such conclusion was required by the findings of fact on which it was based. *Id.*

5. Upon a trial before a referee defendant presented requests to find, which were refused. He thereupon excepted as follows: Defendant separately excepts "to the refusal of the referee to find each of the several seventeen conclusions submitted to the referee by the said defendant so far as the referee's conclusions are not in conformity therewith." *Held*, that such exception was not sufficiently definite and specific to present a question for review. *Id.*

See APPEAL.
PLEADING.
TRIAL.

PRESS.

— *As to liability of telegraph company on contract for transmitting press reports to newspapers.*

See Goodsell v. W. U. T. Co. 430

PRESUMPTION.

1. The existence of the right of an owner of a lot abutting on a public street in a city to use and enjoy the light, air and access afforded by the street, as an appurtenance of his lot and property is presumed. *Hughes v. Met. E. R. Co.* 14

2. *It seems*, the presumption may be rebutted by showing that the

rights have been parted with in any of the modes by which incorporeal hereditaments may be transferred, surrendered or lost. *Id.*

3. The burden of rebutting such presumption, however, is on the party who claims to have acquired such right. *Id.*

4. *It seems*, that under the provisions of the act of 1842 (Chap. 306, Laws of 1842), requiring the secretary of state when an act as published in the session laws is certified "as having been passed by the assent of two-thirds of the members elected to each house" to state in connection with it as published in the session laws that it was passed "by a two-thirds vote," and that this statement shall be presumptive evidence that the bill was certified as having been so passed, the presumption thus created may be overcome by the production of the original certificate showing it was not so passed. *Rumsey v. N. Y. & N. E. R. R. Co.* 88

5. But while under the Revised Statutes (1 R. S. 156, § 3), no act shall be deemed to have been passed by a two-thirds vote unless so certified by the presiding officer of each house, a defective certificate which fails to state either way, *i. e.*, as to whether or not the act was passed by a two-thirds vote, is not conclusive to overcome the presumption created by the statement of the secretary in the session laws. *Id.*

6. While to entitle a principal to recover money wrongfully paid by his agent upon a debt of the latter, he must show that the creditor knew that the agent was acting in violation of his authority, knowledge that the money was held by him as agent is sufficient to establish this *prima facie*, as the legal presumption is that an agent has no authority to dispose of the property of his principal in payment of his own debt. *Gerard v. McCormick.* 261

7. Where a vault has been constructed, with knowledge of the city officials, under the sidewalk of a city street, in front of a block

erected and used for business purposes, and had been used for nine years, *held*, consent to its construction was to be inferred from the acquiescence of the city officials having charge of the street and power to give such consent. *Babbage v. Powers.* 281

8. No presumption can be indulged in that a defendant has failed in his duty or omitted to perform his contract obligation. *Lent v. N. Y. & Mass. R. Co.* 504

9. The mere failure of an insurance company to respond to an application for insurance does not raise an inference that it has accepted it and insured the risk. *More v. N. Y. B. F. Ins. Co.* 537

—When intent to waive fraud may not be presumed.
See Pryor v. Foster. 171

PRINCIPAL AND AGENT.

1. When an agent, authorized to lend moneys of his principal but not to take usury, lends such moneys at a usurious rate, and both the sum lent and the usury exacted are secured by the same obligation, which the principal, knowing that it is for a larger amount than the sum loaned, without explanation accepts and has the benefit of, it is an adoption and ratification by him of the act of the agent, and neither the principal nor his assignees can enforce the obligation. *Bliven v. Lydecker.* 102

2. The power of an agent to create rights by contract for his principal includes an implied duty on his part to observe and not defeat or destroy those rights. *Am. S. B. Ins. Co. v. Anderson.* 134

3. Plaintiff, an insurance company, entered into a contract with defendants to act as its agents in procuring insurance, and agreed to pay them thirty per cent of the premiums received on the policies obtained. Defendants induced H. & Co. to take out policies in plaintiff's company, and they were paid their percentage on the premiums. Before these policies expired, defend-

ants' contract with plaintiff came to an end, and H. & Co., having been induced by defendants to insure in another company for which they had become agents, requested plaintiff to cancel their policies, which it did, and as provided by said policies returned to H. & Co. the premium unearned. *Held*, that plaintiff was entitled to recover of defendants the percentage received by them upon the amount of premiums so refunded; that although defendants' agency had ceased, they were not at liberty to defeat the purpose or duration of the contracts of insurance to the prejudice of plaintiff, and retain all the fruits thereof received by them. *Id.*

4. It seems a director of an insurance company, or a member of its executive committee has no right to approve of his own application for a policy in such company. *Pratt v. D. H. M. F. Ins. Co.* 206

5. An officer of such a company, however, is not debarred from making application for insurance, and if his application is accepted by another officer having authority to accept applications, the company is bound. *Id.*

6. The officers of a corporation organized under the act providing "for the formation of county cooperative insurance companies" (Chap. 362, Laws of 1880, amended by chap. 171, Laws of 1881), have the same power to waive defects or ratify invalid policies as officers in a stock insurance company. *Id.*

7. While to entitle a principal to recover money wrongfully paid by his agent upon a debt of the latter, he must show that the creditor knew that the agent was acting in violation of his authority, knowledge that the money was held by him as agent is sufficient to establish this *prima facie*, as the legal presumption is that an agent has no authority to dispose of the property of his principal in payment of his own debt. *Gerard v. McCormick.* 261

8. One, therefore, who receives such payment, with knowledge that the

- money was held by his debtor as agent, does so at his peril, and to defeat a recovery must show authority in the agent to so dispose of the money. *Id.*
9. B., as the agent of plaintiffs, had charge of certain premises known as "Glass Buildings;" he deposited the rents collected to the credit of a bank account kept in his name as "Agent Glass Buildings." In payment of a debt which B. owed defendant, as collateral for which the latter held certain securities, he received a check on the bank signed by B., with the words "Agt. Glass Buildings" following his signature, and on receipt surrendered the securities. The check was paid by the bank and charged to said account. B. had no authority to so use the fund. In an action to recover the amount thereof, there was no evidence tending to raise any question as to defendant's good faith, except such receipt of the check. *Held*, that the form of the check was sufficient to indicate to defendant the existence of an agency, and to put him on inquiry as to the agent's authority to so use the money; and so, that a refusal to nonsuit and a submission of the case to the jury, was proper. *Id.*
10. The power of a ship's husband, as such, and in the absence of any special authority to bind the owners of the ship by his contracts, relates only to the present or future use of the ship; it is based on present and pressing necessity. *Chase v. McLean.* 529
11. Where, therefore, in an action against the owners of a vessel to recover an alleged loan to the ship's husband for the use of the vessel, it appeared that the loan was made when the vessel was out of commission, and that the money was borrowed and used in paying a debt contracted three years before for supplies furnished the vessel, *held*, defendants were not liable. *Id.*
12. Also *held*, that a ship's master has no authority to borrow money at the charge of the owners to pay such an indebtedness. *Id.*
13. In an action upon an alleged parol contract of insurance it appeared that S., the general agent of defendant, sent blank applications to N., with instructions that in case he secured business for defendant to fill out an application and forward to him (S.). N., on May twelfth, as a result of negotiations with plaintiffs, filled out an application and forwarded it to S. Plaintiffs were informed by N. that he could not issue a policy, and before one could be issued the application would have to be approved by some other person. S., on receiving the application, wrote to N. that the risk being special he did not wish to write it without submitting it to the company. On the same day S. wrote defendant, stating the application and the nature of the risk. Defendant, on receipt, immediately replied rejecting the application. Of this action S. neglected to notify plaintiffs or N. Plaintiffs, on May thirtieth, sent a check to N. for the premium agreed upon, which the latter received, but did not remit to S. or defendant, and it did not appear they had any knowledge of the payment. A day or two thereafter N. told plaintiffs that he had heard nothing from the company, and consequently it was all right, and they would get the policy in a day or two. The property was destroyed by fire on June sixth. *Held*, that defendant was not liable; that N., having to plaintiff's knowledge no authority to contract, could not bind defendant by acceptance of the premium or by his conclusion drawn from its failure to report its action upon the application. *More v. N. Y. B. F. Ins. Co.* 537

PRINCIPAL AND SURETY.

1. Under the provisions of the act of 1850 (Chap. 295, Laws of 1850) and the similar provision of the Code of Civil Procedure (§ 1380) providing that after one year from the death of a party against whom in his life-time a final money judgment had been rendered, the same "may be enforced by execution against any property upon which it is a lien," with like effect as if

the judgment debtor was still living, no distinction is made between judgments upon sole, joint, or joint and several contracts, and the land of a deceased surety, against whom, as surety, a judgment has been recovered, and has become a lien upon said land in his life-time, is not excepted and is not relieved from the lien by his death. *Baskin v. Huntington.* 813

2. Where, therefore, prior to the death of one of the makers of a joint and several promissory note, who executed it as surety, judgment had been recovered against him thereon, and had become a lien upon his real estate, *held*, that the lien of the judgment was not discharged by his death, and was enforceable by execution issued as prescribed by the Code of Civil Procedure (§§ 1379, 1380, 1391); and this, although the judgment was recovered and the surety died before the going into effect of the provision of the Code (§ 758, as amended in 1877) declaring that the estate of a person jointly liable with others upon contract shall not be discharged by his death. *Id.*

— *When cashier of bank misappropriated securities pledged as collateral for a note discounted by bank indorsed by him, held, that the bringing of action and recovery of judgment on note was not waiver of right to sue the sureties on bond given by him, conditioned for the faithful discharge of his duty; that the two remedies were not inconsistent, but concurrent.*

See W. N. Bank v. Birch. 221

PRIVATE WAY.

1. A right of way, which is reserved, but not specifically defined in a conveyance, need only be such as is reasonably necessary and convenient for the purpose for which it was created. *Grafton v. Moir.* 465
2. In an action to restrain defendant from obstructing an alley-way, the following facts appeared: D., who owned a parcel of land on the corner of two streets in New York city, built thereon four houses

fronting on one of the streets, with a stable in the rear of each, leaving an alley-way which afforded access from the side street to the stables. D. subsequently conveyed the corner lot to defendant, reserving "the right of way through and over the carriage or alley-way" to the three stables on the other lots "as long as the said three stables shall be occupied as private stables." The third lot was conveyed to plaintiff. Defendant built over the alley-way a brick building, resting on iron girders, supported by walls on either side. The trial court found that the carriage-way was left as convenient, in regard to breadth, for egress and ingress of vehicles as it was before the changes were made; that it did not appear that such egress and ingress had been in any respect interfered with or rendered less commodious, and that the alley, as it now exists, has sufficient light and air for all purposes of egress and ingress. The complaint was dismissed. *Held*, no error; that defendant's deed vested in him all the rights of absolute ownership, except as restricted by the reservation; that, under the reservation, plaintiff had no right to claim that the whole alley-way should be left open for his use, or to furnish light and air to his stable, but only so much thereof as would afford convenient access to his stable in the usual way, and as would furnish light and air needed for the reasonable enjoyment of the way. *Id.*

3. One C. being the owner of certain premises upon which was a lane or driveway sixteen feet in width, running east from a street, upon the south side of which lane was a store with a hatchway, giving access to the cellar which projected into the lane about five feet, sold and conveyed by full covenant deed to B., "his heirs and assigns," that portion of the premises north of the lane, "also a right of way the whole length of the south line" of the premises conveyed, "between said south line and a line drawn parallel with the north side of the store * * * to be used by the grantee in com-

mon with the grantor, said lane not to be encumbered or built upon by either party." U. subsequently sold and conveyed the remaining portion of said premises, reserving the right of way between the store and B's south line, to be used mutually by the grantee and B., "their heirs or assigns respectively." Defendant having acquired title to the south portion, erected a building thereon which occupied over four feet of the lane. In an action brought by plaintiff, who had acquired title to the north portion, to compel the removal of that part of the building which encroached upon the way, evidence was introduced which, considered with the deed, authorized the finding, and the court found it was the intent of the parties to the deed first mentioned that the right of way should embrace the whole sixteen feet. *Held*, that the covenant that the lane "was not to be encumbered or built upon by either party," was one running with the land; that the words "either party" were not used in a restrictive sense, but as including all persons whom the party undertook to represent and bind with himself, that is "his heirs, executors, administrators and assigns;" and that, therefore, plaintiff was entitled to the relief sought. *Dexter v. Beard*. 549

PROMISE.

See CONTRACT.

PUBLIC INSTRUCTION.

See COMMON SCHOOLS.

QUARANTINE.

1. Under the Quarantine Law of this state (Chap. 358, Laws of 1863, as amended by chap. 592, Laws of 1865), and the United States Statutes (§§ 4792, 4793), the health officer of the port of New York is clothed with power to use means to protect the public against *contagia* from infected

vessels and cargoes arriving at that port. *Lockwood v. Bartlett*. 340

2. Under the provisions of the Quarantine Act (Chap. 358, Laws of 1863, as amended by chap. 592, Laws of 1865), which declares that "whenever any expense shall be incurred by the health officer, or whenever any services shall be rendered by him or his employes in the discharge of the duties imposed upon him by law in relation to vessels, merchandise * * * under quarantine, such expense and services shall be paid for, by the master of the vessels" to the health officer, and shall be a lien on the vessels, merchandise, etc., such charges can only be incurred through the official action or in execution of the orders, of the health officer, and are subject to his control; to create the lien, his official sanction and responsibility are essential. *Id.*

3. In an action to recover damages for the alleged unlawful taking and detention of certain cargoes of rags imported by plaintiffs, it appeared that the warehouse of the defendants, who composed the firm of B. & Co., had, under the advice and with the approval of the health officer of the port of New York and of the health commissioner of Brooklyn, been designated by the secretary of the treasury as a warehouse for the storage and disinfection of imported rags. Robbins' Reef had also been designated as another place for disinfection. In pursuance of this authority the collector sent one cargo of the rags for disinfection to the warehouse of B. & Co., and another to Robbins' Reef. *Held*, that what was done in transferring the rags from the vessels to the selected warehouses was within the power of the health officer, and so that the charges for lighterage paid, in accordance with the custom, by B. & Co. on the rags sent to their warehouse, and the usual charges for storage for the time the goods properly remained in said warehouse were a lien upon the rags. *Id.*

4. The quarantine regulations promulgated by the health officer

contained a provision to the effect that a vessel with rags from healthy ports would be required to furnish satisfactory evidence that the rags were gathered in districts where no suspicion of cholera existed; in default of which the cargo would be subject to the regulation applicable to rags from an infected port. The evidence required was an affidavit of the shipper, and the certificate of the United States consul at the port of shipment "that the person making the affidavit is a man of good character and entitled to credit." The rags in question came from a healthy port. There was an affidavit of the shipper, as required, but the consular certificate did not contain the statement required as to the character of the affiant. *Held*, that the proof was defective and the rags were properly held subject to said regulation. *Id.*

5. A company had established disinfecting works at Robbins' Reef and was employed by the health officer to perform that work. The lighterage charges on the cargo delivered there were paid by B. & Co. The rags delivered to that firm were disinfected by it, the work being done without any employment or direction of the health officer, and without approval by him of the work or the charge therefor. Said firm refused to deliver the rags in its warehouse to plaintiffs unless the bills for lighterage and disinfection were paid. They were paid by plaintiffs under protest, and the rags were thereupon delivered to them. *Held*, that the charges for disinfection were not brought within the statute, as they had not the official sanction of the health officer; and so, that B. & Co. had no lien therefor, and so far as defendants required the payment of those charges as a condition of delivery, they were chargeable with duress of property and plaintiffs were entitled to recover back the same. *Id.*

6. S., the health officer was made a party defendant, the complaint charging a conspiracy between him and the other defendants for

the purpose of enabling them to create the charges and assert the lien. The jury failed to agree upon a verdict as to S., but rendered a verdict against the other defendants, which plaintiffs consented to and did accept. It was claimed that the verdict was ineffectual to sustain a judgment against the defendants other than S. *Held*, untenable; that the charge of conspiracy was not necessarily a controlling element and did not require a verdict for or against all of the defendants jointly; that plaintiffs having accepted the verdict there was no further support for the action against S., and as the action was in tort a verdict against the other defendants was proper. *Id.*

QUESTIONS OF LAW AND FACT.

Upon the trial of an issue of fact by a referee or by the court without a jury, a refusal to make any finding whatever upon a question of fact, where a request to find is seasonably made by either party, or a finding without any evidence tending to sustain it, is a ruling upon a question of law. (Code Civ Pro. § 993.) *Van Bokkelen v. Berdell.* 141

— *When in action upon promissory note brought by a transferee, the maker shows it was obtained by fraud, and the plaintiff seeks to establish by his own testimony that he is a bona fide purchaser, although his testimony is undisputed, the question is for the jury, and a direction of a verdict in his favor is error.*

See Joy v. Defendorf. 6

— *When question as to whether one sought to be charged as trustee of a manufacturing corporation, because of failure to file amended report, is one of fact, and so not reviewable here.*

See F. Nat. Bank v. Lamon. 366

— *When question of negligence one of fact.*

See Morrison v. B. & S. A. R. R. Co. 166

Keane v. Village of Waterford. 188

— When question of negligence one of law.

<i>See De Vau v. P. & N. Y. C. & R. R. Co.</i>	682
<i>Ayres v. Village of Hammondsport.</i>	665
<i>Scott v. P. R. R. Co.</i>	679
<i>Reichel v. N. Y. C. & H. R. R. Co.</i>	682

RAILROAD CORPORATIONS.

1. In an action to recover damages for injuries to plaintiff's property abutting on a public street in New York city, the fee of which is in the city, arising from the building and maintaining of defendants' elevated road in said street, the following facts appeared: The construction of said road was commenced in July, 1878. The premises were then owned by E., who, in December of that year, sold and conveyed them, and to his title plaintiff claimed to have succeeded in November, 1881. Defendants, upon cross-examination of one of the grantees of E., drew forth evidence to the effect that they bought and owned the lot; that the other grantees conveyed to him, and that he became the sole owner. Defendants also, for the purpose of showing a lien on the premises, introduced in evidence a mortgage thereon executed by E., and proved that he purchased it in 1878. Defendants raised no question on the trial as to plaintiff's title, and requested no finding that she had no title, or that title was in another, but excepted to a finding of title in plaintiff. *Held*, untenable; that it could not be held the finding had no evidence to sustain it. *Hughes v. Met. E. R. Co.* 14
2. For the purpose of rebutting the presumption that plaintiff owned the easements in the street, defendants proved that before she acquired title said easements had been interfered with substantially to the same extent as when the action was brought. They also proved that proceedings had been instituted to acquire from plaintiff the right to maintain and operate the road in front of her premises, and the court found that in such proceedings plaintiff had

been duly served and brought into court, and that they were still pending. *Held*, that the defendants' evidence amounted to an admission that they occupied the street in subordination to plaintiff's right to compensation. *Id.*

3. Also *held*, that plaintiff was entitled to recover a sum awarded for damages to the fee, as a condition of defendants being allowed to continue the construction and operation of its road. *Id.*
4. The provisions of the General Railroad Act of 1890 (Chap. 565, Laws of 1890), authorizing a railroad corporation to construct its road across or along any stream or water-course and removing the exception in the similar provision of the act of 1850 (Chap. 140, Laws of 1850), of the right to obstruct any navigable stream or lake, has no effect upon a patent for lands under the waters of a navigable stream issued by the state prior to the passage of said act of 1850, and so does not divest the patentee of any rights acquired under his patent. *Rumsey v. N. Y. & N. E. R. R. Co.* 88
5. In an action to recover damages for injuries to plaintiff's premises, caused by the construction and maintenance of an elevated railroad on a street in front thereof, it appeared that the premises in question extended from said street to another street in the rear, and were covered by a single brick building. Formerly it consisted of two lots, having different owners; they were conveyed to one person in 1825, before defendants' road was authorized to be built, and since then have been conveyed and occupied as one lot. There was no evidence that portions of the premises fronting on each street were occupied separately. *Held*, that plaintiff was, as abutting owner, entitled to recover his damages for injuries to the whole premises considered as a single lot; that while the fact that the premises were accessible to persons, property, light and air from both streets was important as bearing on the extent of the injuries, it did not preclude the recovery.

ery of any damages for injuries to that portion on another street. *Stevens v. N. Y. E. R. R. Co.* 95

6. Under the act of 1880 (Chap. 147, Laws of 1880), which permitted the defendant to agree with commissioners appointed by the act on behalf of the city of Rochester, upon a plan to elevate its tracks along and across the city streets and to close up streets, etc., a portion of a street upon which plaintiff's premises abutted was discontinued and defendant having previously obtained title to the fee of the street, erected thereon an embankment about fourteen feet high, upon which it laid its tracks, leaving a space between it and said premises so narrow as not to admit of the approach of a team and carriage to them. Plaintiff's premises were used and occupied as a hotel and boarding-house. In an action to recover damages, upon these facts appearing, the court directed a verdict for the defendant. *Held*, error; that the plaintiff established a right to recover, and the question of damages should have been submitted to the jury. *Egerer v. N. Y. C. & H. R. R. Co.* 108
7. The provision of the General Railroad Act (§ 44, chap. 140, Laws of 1850), requiring corporations organized thereunder to "erect and maintain fences on the sides of their road * * * with openings or gates or bars therein, and farm crossings of the road for the use of the proprietors of lands adjoining such railroad," was designed to compel such corporations to construct and maintain such crossings over their lines as are necessary to enable owners, having land abutting on either or both sides of the road, to reach and work their properties. *B., S. & C. Co. v. D., L. & W. R. R. Co.* 152
8. The statute does not limit the right of adjoining owners to crossings solely for agricultural purposes, but they may be ordered to enable owners to remove the natural products of the land, or stone, minerals, etc., therefrom. *Id.*
9. Nor is the right limited to a proprietor, a strip of whose land has

been taken for the road, leaving remaining portions adjoining such strip on both sides. *Id.*

10. While the provision of the act of 1864 (§ 2, chap. 582, Laws of 1864), requiring the lessee of a railroad to "maintain fences on the sides of the road so leased * * * with openings or gates or bars therein at the farm crossings of such railroad, for the use of the proprietors of the lands adjoining such railroads," does not expressly require such lessee to build and maintain farm crossings, yet it is the duty of such a lessee in possession, with power to make repairs and additions, to construct necessary farm crossings. *Id.*
11. This obligation is not confined to domestic corporations or those organized under the General Railroad Act, but applies to a foreign corporation which, under authority given to it by statute, has leased and is operating a road in this state, and has covenanted by its lease to perform all things in connection with the road which the lessor might be required to perform. *Id.*
12. Where, therefore, defendant, a corporation organized in another state, having been authorized by statute (Chap. 244, Laws of 1855) to contract with corporations in this state and to sue and be sued in its courts, leased the road of a railroad corporation of this state, the lease containing a provision requiring the lessor "to do and perform all acts and things" which the lessor "would be bound by law to do and perform" had the lease not been made, *held*, that the duty of constructing farm crossings, in the cases prescribed, was imposed upon it. *Id.*
13. Plaintiff is the owner of a farm through which, before the construction of defendant's road, another railroad corporation, the E. R. Co., had constructed its road, the grade of which was about on a level with the natural surface of the ground. The road cut off the larger portion of the farm, upon which were stone quarries, from the highway; to give access to

this, a grade crossing was constructed where a farm road crossed the tracks. The road so leased by defendant was laid out across said portion of the farms parallel with and a short distance from the other road. The owners of the farm conveyed to the E. R. Co. the strip between the two roads, reserving a way across in continuation of the way in use. The bed of defendant's road was raised above the surface of the ground, and where it crossed the farm road the elevation was about thirteen feet. Plaintiff demanded that an under crossing be constructed in continuation of the other crossing, so as to give access to said portion of its farm; this defendant refused, but built an over crossing at a point where the grade of its road came near the natural surface, about 550 feet away from the original crossing. In an action to compel the construction of an under crossing as required, *held*, the facts justified a finding that a suitable crossing had not been built; that the questions where and how one should be built, and whether under or over defendant's tracks, were questions of fact for the trial court, and there being evidence to sustain its findings in these respects, and it appearing that it had fairly exercised its discretion, its determination could not be disturbed here. *Id.*

14. Plaintiff, a man of seventy years, without anything in his hands to impede him, signalled a car which was passing at the usual speed on defendant's road on a crowded street; the brake being applied, the car slowed up, but did not entirely stop; plaintiff caught hold of the rail of the rear platform with both hands, and as he put his feet on the step the brake was relaxed, the car started with a sudden jerk, his feet were thereby thrown from the step, he was dragged along for a distance and was injured. In an action to recover damages, *held*, that the question of defendant's negligence and of plaintiff's contributory negligence were questions of fact, and so were properly submitted to the jury; that the fact that the car was moving slowly when plaintiff

attempted to get on did not establish contributory negligence as matter of law. *Morrison v. Bdway. & 7th Ave. R. R. Co.* 166

15. In 1878 S. executed and delivered to W. a conveyance of certain premises, absolute in form, but which were in fact intended by the parties as collateral security for advances made by W. to S. In 1882 W., at the request of S., conveyed said premises to plaintiff, who assumed a mortgage thereon and paid the balance of the purchase-price in cash, which was the full value of the premises, and S. received the benefit thereof. Plaintiff had no actual notice that the deeds to W. were intended as security only. The premises were at the time of the conveyance in the possession of S. through his tenants, and plaintiff failed to inquire of them as to the title under which they held. Possession was surrendered to plaintiff after her purchase, and she continued in possession thereafter. In an action to recover damages for injuries from the maintenance of an elevated railroad in front of said premises, and to restrain its future maintenance and operation, S. testified that the conveyance to plaintiff was made with his consent, and that his debt to W. had been paid. The court found that plaintiff has, since the conveyance to him, been seized of an estate of inheritance in fee simple absolute in said premises, and through his agents and servants been in possession of the same. *Held*, no error; that plaintiff's failure to make inquiry of the tenants did not, under the circumstances, affect his position as *bona fide* purchaser; that the general rule that possession is notice to the person proposing to purchase of the rights of the occupant did not apply; also, that S. was estopped from asserting or maintaining any claim to the title, or right to redeem. *Minton v. N. Y. E. R. R. Co.* 332
16. An elevated railroad erected in a city street, the right to construct and operate which has not been obtained by purchase from the abutting owners, or by proceedings to condemn, is, as to them, an

- illegal structure, and a continuing trespass upon their rights, from the time it was built. *Thompson v. Manhattan R. Co.* 360
17. Such a trespass is an injury to the inheritance, and a person seized of an estate in remainder in premises abutting upon the street, may maintain an action for an injunction against the railroad company, "founded upon an injury done to the inheritance, notwithstanding an intervening estate for life." (Code Civ. Pro. §§ 1665, 1681.) *Id.*
18. To constitute a cause of action against a railroad company under the General Railroad Act (§ 18, chap. 140, Laws of 1850, as amended by chap. 198, Laws of 1876), to recover the amount of an award for land taken by it for railroad purposes, it is necessary that the final order confirming the award of the commissioners of appraisal, or a certified copy thereof, should be recorded in the county clerk's office. *Lent v. N. Y. & Mass. R. Co.* 504
19. An allegation, therefore, in the complaint in such an action of such recording is essential, so also is an averment that the defendant has failed to pay the award or is indebted to plaintiffs therefor. *Id.*
20. The complaint in such an action alleged the incorporation of defendant, the presentation by it of a petition for the appointment of commissioners, their appointment and report of amount to be paid plaintiff, the confirmation thereof on defendant's motion, and that defendant subsequently appealed from said order to the General Term, where it was affirmed. Then followed a prayer for judgment for the amount of the award and costs. There was no allegation that defendant had failed or omitted to pay the award or was indebted to plaintiff. Defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action, and the demurrer was overruled. *Held, error. Id.*
21. The complaint did not expressly allege that the order confirming the report of the commissioners had been recorded as required by said act to create a debt against defendant. It did allege, however, that the order had been "entered," and the paragraph closed with this clause: "To which order or its record plaintiffs beg leave to refer." *Held, that the word "entered" was properly used as synonymous with "recorded;" and so, that the complaint in this respect was sufficient. Id.*
22. The theory upon which an action at law may be supported against an elevated railroad company by an abutting owner upon a street through which it runs, is that it is in such sense a trespasser or wrongdoer as to be liable to such owner for all the injuries resulting proximately from the wrongful act of maintaining and operating its road. *Moore v. N. Y. E. R. R. Co.* 523
23. The continued invasion of the privacy of the occupant of a building, where it has the effect to reduce the rental value is such an injury, and for the damages so resulting the company is liable. *Id.*
24. While the looking in at the windows of a dwelling, by the patrons and employes of an elevated railroad company, from its platform and the stairs leading to the same, is not the act of said company, as the latter furnishes the means and opportunity and by its invitation and procurement for the purpose of its business, brings those persons where they can thus invade the privacy of said dwelling, it is liable for the damages thus occasioned. *Id.*
25. Plaintiff, an employe of defendant, was struck by a dirt-plow which fell from a car, one of a train from which dirt and gravel was being removed by its use. Under the charge of the court, the jury were permitted to find from the fact that the accident occurred, without any evidence of negligent or unskillful construction of the plow, or of a failure to keep it in repair, that the falling of the plow was owing to the fault of defendant. *Held, error. De Vau v. P. & N. Y. C. & R. R. Co.* 632

26. In an action by an abutting owner against an elevated railroad company operating its road in a city street, the opinion of a witness as to what would have been the value of the property if the road had not been built is incompetent. *Kernochan v. N. Y. E. R. R. Co.* 651
27. In an action against a railroad company to recover damages for personal injuries alleged to have been caused by defendant's negligence, plaintiff may not support his own testimony, as to the effect of the injuries, by proof of declarations to the same effect made by him after the accident, and forming no part of the *res gesta*, to persons other than a physician in attendance upon him professionally. *Kennedy v. R. C. & B. R. R. Co.* 654
28. While, when in an action against a railroad or municipal corporation to recover damages for injuries alleged to have been caused by defendant's negligence, it is important to show that defendant had notice of the dangerous character of the defect which caused the injury, testimony is competent to prove other similar accidents, such evidence is not competent where it can have no bearing upon the issue presented. *Dye v. D., L. & W. R. R. Co.* 671
29. Where, therefore, in an action by an employe against a railroad company to recover damages for injuries sustained by plaintiff when engaged in coupling two cars, occasioned by the overlapping of the dead-woods, of the cars, defendant claimed that plaintiff had full knowledge of and took the chances of the dangers, and gave evidence to the effect that it used on its road different kinds of cars, some without any dead-woods and that switchmen in its employ had frequently to make couplings of cars, the dead-woods of which overlapped, *held*, that the admission of testimony showing that similar accidents had occurred on defendant's road was error. *Id.*
30. In an action to recover damages for injuries received while crossing defendant's tracks, it appeared that plaintiff, before stepping upon the first track, looked both ways, but did not look again towards the west, from which direction he knew a train was due; he crossed the first and second tracks and walked east, between the second and third tracks, so near the latter that he was struck by said train. The rumble of the approaching train was distinctly heard by other people in the vicinity. *Held*, that plaintiff was guilty of contributory negligence. *Scott v. Pennsylvania R. Co.* 679
31. Plaintiff, a laborer in defendant's employ, was engaged in shoveling ashes from a pit between the rails. In attempting to get out of the pit as a locomotive approached, he was struck by it and injured. Near the pit was a water-plug so arranged that a locomotive, discharging ashes into the pit, could at the same time take water. The court submitted the question to the jury as to whether the relative position of the water-plug and the stopping-place on the ash-pit was an improper and negligent construction. *Held*, error. *Reichel v. N. Y. C. & H. R. R. R. Co.* 682
32. Defendant provided two employes for locomotives running to the ash-pit and water-plug. *Held*, that negligence could not be imputed to it from the fact that but one of these employes was on the locomotive at the time of the accident, and that a refusal to so charge was error. *Id.*
33. While, for land taken by an elevated railroad company, the full market value must be paid without deduction for benefits, in considering the question as to damages caused by the road to lands not taken, or to the property rights of an abutting owner in the streets through which its road runs, its advantages and disadvantages, benefits and injuries must be considered, and if the benefits equal or exceed the injuries, no damages can be awarded. *Odell v. N. Y. E. R. R. Co.* 690
34. In an action under the General Railroad Act (§ 18, chap. 140,

Laws of 1850, as amended by chap. 95, Laws of 1890), to recover the amount of an award for land taken for railroad purposes, it appeared that defendant was the successor of the P. & E. R. R. Co.; that the original order confirming the commissioners' report was delivered by the counsel for that company to the county clerk, and was copied at full length in a book indorsed P. & E. R. R. Co. orders, with the words "entered and recorded" at the end thereof. Defendant claimed that the order should have been recorded in the book of deeds, and that the recording of the original order, instead of a certified copy thereof, was not in compliance with the law. *Held*, untenable; that there was a substantial compliance with the statute, and defendant, having caused the order to be recorded as it was, it would not be permitted to object. *Morgan v. N. Y. & Mass. R. Co.* 692

RATIFICATION.

When an agent, authorized to lend moneys of his principal but not to take usury, lends such moneys at a usurious rate, and both the sum lent and the usury exacted are secured by the same obligation, which the principal, knowing that it is for a larger amount than the sum loaned, without explanation accepts and has the benefit of, it is an adoption and ratification by him of the act of the agent, and neither the principal nor his assignees can enforce the obligation. *Bliven v. Lydecker.* 102

RECORDING ACT.

An unrecorded conveyance of real estate is not void as against a subsequent purchaser, although for a valuable consideration, who had notice at the time of his purchase of the unrecorded deed; he cannot claim the benefit of the Recording Act. *Dingley v. Bon.* 607

REFERENCE.

1. Although a finding of fact by a referee is wholly unsustained by

evidence, if not excepted to, no legal question is presented which the court may pass upon. *Daniels v. Smith.* 696

2. An exception in terms to the referee's conclusion of law cannot avail the party excepting, if such conclusion was required by the findings, of fact on which it was based. *Id.*

3. Upon a trial before a referee defendant presented requests to find, which were refused. He thereupon excepted as follows: Defendant separately excepts "to the refusal of the referee to find each of the several seventeen conclusions submitted to the referee by the said defendant so far as the referee's conclusions are not in conformity therewith." *Held*, that such exception was not sufficiently definite and specific to present a question for review. *Id.*

— When amendment of complaint on trial before a referee a matter of discretion and his denial of the motion not reviewable here.

See Barnes v. Brown.

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REMEDY.

1. Where, in an equity action, no objection is raised by answer or upon trial that such an action is not the appropriate remedy, the objection is not available upon appeal. *B. S. & C. Co. v. D., L. & W. R. R. Co.* 152

2. A *cestui que trust* is not required to establish his claim by an action at law in order to compel an enforcement of the trust, or to protect the trust property from unlawful interference. *Spelman v. Freedman.* 421

3. Where in an equity action the defendant does not plead want of equitable jurisdiction or allege that plaintiff has an adequate remedy at law, he may not insist upon the trial that an action in equity will not lie. *Watts v. Adler.* 646

4. An action in equity for an accounting between copartners is an

appropriate, if not an exclusive remedy to adjust and settle the partnership affairs. *Id.*

—Where cashier of bank misappropriated securities pledged as collateral for a note discounted by bank indorsed by him, held, that the bringing of action and recovery of judgment on note was not waiver of right to sue the sureties on bond given by him conditioned for the faithful discharge of his duty; that the two remedies were not inconsistent but concurrent.

See *W. N. Bank v. Birch.* 221

See ELECTION OF REMEDIES

RESCISSION.

A purchaser receiving goods under an executory contract of sale, in order to preserve his right to rescind, must examine the goods within a reasonable time after receipt, and if they are found not to conform to the contract as to quality or kind, promptly rescind, either returning or offering to return the goods. *Mason v. Smith.* 474

RIPARIAN OWNERS.

See WATER-WORKS COMPANIES.

ROCHESTER (CITY OF).

1. Under the act of 1880 (Chap. 147, Laws of 1880), which permitted the defendant to agree with commissioners appointed by the act on behalf of the city of Rochester, upon a plan to elevate its tracks along and across the city streets and to close up streets, etc., a portion of a street upon which plaintiff's premises abutted was discontinued, and defendant, having previously obtained title to the fee of the street, erected thereon an embankment about fourteen feet high, upon which it laid its tracks, leaving a space between it and said premises so narrow as not to admit of the approach of a team and carriage to them. Plaintiff's premises were used and occupied as a hotel and boarding-house.

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In an action to recover damages, upon these facts appearing, the court directed a verdict for the defendant. *Held*, error; that the plaintiff established a right to recover, and the question of damages should have been submitted to the jury. *Egerer v. N. Y. C. & H. R. R. Co.* 108

2. The common council of the city of Rochester, by resolution, authorized the employment of some person to keep a book containing a record of the street lamps in the city, and showing the number each day not lighted as reported to him by the policemen of that city. B. was so employed for a period stated, at a specified salary, and he entered upon the discharge of his duties. The common council, by another resolution, directed the mayor to enter into a contract with B. for the performance by him, at a compensation stated, of the duties specified in the prior resolution, and in addition "to perform such other duties as may be connected with the public street lighting system of the city as may be required" and to furnish "written reports upon any of the subjects aforesaid." The regulations for the admission of persons into the service of the city, made by the mayor and approved by the civil service commission, after certain exceptions, classified the service as follows: "Schedule B (Part one). All officers and members of the Police and Fire Department. (Part two). All other subordinate officers and assistants." Appointments in part two were required to be made from persons whose names were certified by the board of examiners. B. had never been examined, nor was his name certified by that board. *Held*, that B., under both resolutions, was an assistant to the lamp committee, with duties merely clerical, and so, his employment fell within part two, and his admission into the city service was illegal; that any payments made to him by the city officials would be a waste of the city funds, and, therefore, that an action was maintainable, at the suit of a taxpayer, to restrain such payment. *Peck v. Belknap.* 394

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SALES.

1. A purchaser, receiving goods under an executory contract of sale, in order to preserve his right to rescind, must examine the goods within a reasonable time after receipt, and if they are found not to conform to the contract as to quality or kind, promptly rescind, either returning or offering to return the goods. *Mason v. Smith.*

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2. Defendants ordered from plaintiffs a quantity of gloves of a specified quality and price; the gloves were shipped and received by the defendants; they, about three weeks after such receipt, returned a portion of the gloves as defective, with a letter stating that they had examined every pair and were not satisfied with them and would like to return them all. Plaintiffs credited defendants with the gloves returned and wrote them stating they were at liberty to return all not satisfactory, in exchange for which plaintiffs would send "A No. 1 goods." Defendants returned at different times the gloves unsold, with requests that plaintiffs would credit them with the amounts. Plaintiffs sent other perfect gloves for those returned, which defendants, without opening the box containing them, refused to receive, but caused them to be returned to plaintiffs, who refused to receive them. In an action to recover the purchase-price, *held*, that as defendants after having, as shown by their first letter, examined all of the gloves, retained a portion, they must be deemed to have elected to retain them under the contract, and thereupon their right to rescind ended; that their expressions and dissatisfaction did not amount to a rescission, and the gloves subsequently returned were to be considered as having been so returned in accordance with plaintiffs' offer to replace them with other gloves, and this having been done, plaintiffs were entitled to recover.

*Id.**See* FORECLOSURE.

VENDOR AND PURCHASER.

SERVICE (PROOF OF).

An order was obtained for service by publication of the summons in a foreclosure suit upon the owner of the equity of redemption, who was a non-resident, but before the completion of the service the plaintiff died, and publication was thereafter continued to the termination of the six weeks directed by the order; afterwards the action was continued pursuant to the order of the court in the name of the executrix of the deceased plaintiff, without further publication or appearance on the part of said defendant. A judgment of foreclosure and sale was rendered and a sale made pursuant thereto. Upon a case submitted to determine as to whether plaintiff, who claimed title to the land under the foreclosure sale was entitled to the specific performance of a contract for the purchase thereof, *held*, that there was no effectual service of the summons in the foreclosure suit upon said defendant therein, and as to him the court acquired no jurisdiction, and as the equity of redemption was not barred by the sale, plaintiff was not able to convey a good title; that the effect of the death of the original plaintiff in the foreclosure suit was to suspend further proceedings other than for the continuance of the action, until his executrix was substituted; that while the order for service by publication may have remained available to give the court jurisdiction, the publication should have been commenced *de novo* after the substitution and continued for the requisite six weeks. *Reilly v. Hart.*

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SHIPPING.

1. The power of a ship's husband, as such, and in the absence of any special authority, to bind the owners of the ship by his contracts, relates only to the present or future use of the ship; it is based on present and pressing necessity. *Chase v. McLean.*
2. Where, therefore, in an action against the owners of a vessel to recover an alleged loan to the ship's husband for the use of the vessel,

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it appeared that the loan was made when the vessel was out of commission, and that the money was borrowed and used in paying a debt contracted three years before for supplies furnished the vessel, *held*, defendants were not liable.

Id.

3. Also *held*, that a ship's master has no authority to borrow money at the charge of the owners to pay such an indebtedness. *Id.*

SPECIFIC PERFORMANCE.

1. A purchaser of real estate is entitled to a marketable title free from reasonable doubt. *Dingley v. Bon.* 607

2. Specific performance of his contract will not be decreed where the title depends on a disputed question of fact, outside of the record, about which there is reasonable doubt; and when the parties interested therein are not before the court. *Id.*

3. In an action to compel the specific performance of a contract for the purchase of land, the following facts appeared: The premises were conveyed in 1854 by J. & G. to H., by deeds which recited that the grantors had conveyed portions thereof to L., S. & B., and taken back from them mortgages thereon and that the grantors intended to convey their interests in the premises and in said mortgages. Plaintiff took title under said deeds. No deed to L., S. or B. appeared on record. Plaintiff claimed that the recitals in said deeds only amounted to constructive notice, casting upon the purchaser the duty of ascertaining from the records as to the conveyances referred to, and as the records disclosed nothing, the purchaser took an absolute title in fee. *Held*, untenable; and that plaintiff's title was not free from reasonable doubt. *Id.*

4. It appeared that K., plaintiff's grantor, contracted to purchase the premises, but refused to perform his contract because of the recitals in the deeds to H. There-

upon an action to compel specific performance was brought against K., which resulted in a judgment for specific performance; K.'s objection being overruled upon the ground that it appeared the recitals in the deeds were not true in fact; that no deeds were ever given to L., S. or B., but simply executory contracts, which were subsequently canceled and surrendered. K. thereupon took title. *Held*, that as neither L., S. nor B. were made parties to said action, they were not bound by the judgment, and it was not binding upon defendant. *Id.*

STATE.

1. A state may adjudge the status of its citizens towards a non-resident, and so long as the operation of such a judgment is kept within its own confines, other states must acquiesce, but it has no effect beyond the limits of the state. *Williams v. Williams.* 193

2. *It seems* the legislature has power to discriminate between residents and non-residents in favor of the former, in regard to its waters, the common property of the people of the state. *People v. Lowndes.* 455

STATUTES.

1. *It seems* that under the provisions of the act of 1842 (Chap. 306, Laws of 1842), requiring the secretary of state when an act as published in the session laws is certified "as having been passed by the assent of two-thirds of the members elected to each house" to state in connection with it as published in the session laws that it was passed "by a two-thirds vote" and that this statement shall be presumptive evidence that the bill was certified as having been so passed, the presumption thus created may be overcome by the production of the original certificate showing it was not so passed. *Rumsey v. N. Y. & N. E. R. R. Co.* 88

2. But while under the Revised Statutes (1 R. S. 156, § 3), no act shall be deemed to have been passed by a two thirds vote unless

so certified by the presiding officer of each house, a defective certificate which fails to state either way, *i. e.*, as to whether or not the act was passed by a two-thirds vote, is not conclusive to overcome the presumption created by the statement of the secretary in the session laws. *Id.*

3. In such case the journal of the house whose presiding officer has made the defective certificate may be resorted to for the purpose of determining the fact. *Id.*

4. *It seems* it would not be proper to go back of the certificate, if in due form, for the purpose of impeaching it. *Id.*

— § 9, tit. 8, chap. 863, *Laws of 1873.*

— Chap. 114, *Laws of 1883.*

See Levy v. Newman, 11.

— Chap. 306, *Laws of 1842.*

— Chap. 140, *Laws of 1850.*

— Chap. 283, *Laws of 1850.*

— Chap. 565, *Laws of 1890.*

— 1 R. S. 156, §§ 2, 3.

See Rumsey v. N. Y. & N. E. R. R. Co., 88.

— Chap. 147, *Laws of 1880.*

See Egerer v. N. Y. C. & H. R. R. Co., 108.

— § 44, chap. 140, *Laws of 1850.*

— Chap. 244, *Laws of 1855.*

— § 2, chap. 582, *Laws of 1864.*

See B. S. & C. Co. v. D., L. & W. R. R. Co., 152.

— Chap. 342, *Laws of 1885.*

See Stevens v. Ogden, 182.

— 1 R. S. 728, § 49.

— 1 R. S. 729, § 58.

— 1 R. S. 744, § 4.

— 2 R. S. 134, § 6.

See Bates v. L. M. Co., 200.

— Chap. 737, *Laws of 1873.*

— Chap. 415, *Laws of 1876.*

See P. W. W. Co. v. Bird, 249.

— Chap. 295, *Laws of 1850.*

See Baskin v. Huntington, 313.

— § 19, chap. 555, *Laws of 1864.*

— Chap. 567, *Laws of 1875.*

— Chap. 528, *Laws of 1881.*

See Smith v. Proctor, 319.

— Chap. 358, *Laws of 1863.*

— Chap. 592, *Laws of 1865.*

See Lockwood v. Bartlett, 340.

— § 12, chap. 40, *Laws of 1848.*

See F. N. Bank v. Lamon, 366.

— §§ 1, 2, 3, tit. 6, chap. 519, *Laws of 1870.*

See Hoffeld v. City of Buffalo, 387.

— Chap. 673, *Laws of 1887.*

See Peck v. Belknap, 394.

— § 30, chap. 503, *Laws of 1887.*

See Spelman v. Freedman, 421.

— Chap. 90, *Laws of 1860.*

— Chap. 172, *Laws of 1862.*

See Blacchinska v. Howard Mission, 497.

— § 18, chap. 140, *Laws of 1850.*

— Chap. 198, *Laws of 1876.*

See Lent v. N. Y. & M. R. Co., 504.

— Chap. 342, *Laws of 1885.*

See Van Clief v. Van Vechten, 571.

— § 3, chap. 466, *Laws of 1877.*

See Roberts v. Victor, 585.

— § 25, chap. 280, *Laws of 1847.*

— § 1, chap. 354, *Laws of 1880.*

See In re King, 602.

— § 18, chap. 140, *Laws of 1850.*

— Chap. 95, *Laws of 1890.*

See Morgan v. N. Y. & M. R. Co., 692.

See ACTS OF CONGRESS.

STOCK BROKER.

1. A stock broker who holds collateral security for the stock transactions of a customer is not required, in the absence of a special agreement, to realize upon the collaterals, or to return the same to his customer before bringing an action to recover a balance found due him on closing up the transactions. *DeCordova v. Barnum*. 615

2. In such an action it appeared that plaintiff sold out the stock purchased and carried for defendant, pursuant to his order. Defendant offered to prove that it was the custom of stock brokers, where collateral was put up as a margin, and the account became sufficiently reduced to jeopardize it, to advertise and sell the collateral and charge his customer with the balance, and that this custom was known to plaintiff at the time the margin was put up and the account closed. This was excluded on objection. *Held*, no error; that whatever the custom of brokers might be while a speculation was pending, it had no application to a broker's right to recover what is due him after he has carried his customer's stock as long as requested, and finally sold pursuant to an express order. *Id.*

SUMMONS.

An order was obtained for service by publication of the summons in a foreclosure suit upon the owner of the equity of redemption, who was a non-resident, but before the completion of the service the plaintiff died, and publication was thereafter continued to the termination of the six weeks directed by the order; afterwards the action was continued pursuant to the order of the court in the name of the executrix of the deceased plaintiff, without further publication or appearance on the part of said defendant. A judgment of foreclosure and sale was rendered and a sale made pursuant thereto. Upon a case submitted to determine as to whether plaintiff, who claimed title to the land under the foreclosure sale was entitled to the specific performance of a contract for the purchase thereof, *held*, that there was no effectual service of the summons in the foreclosure suit upon said defendant therein, and as to him the court acquired no jurisdiction, and as the equity of redemption was not barred by the sale, plaintiff was not able to convey a good title; that the effect of the death of the original plaintiff in the foreclosure suit was to suspend further proceedings other than for the continuance of the action, until his executrix was substituted; that while the order for service by publication may have remained available to give the court jurisdiction, the publication should have been commenced *de novo* after the substitution and continued for the requisite six weeks. *Reilly v. Hart.* 625

TAXPAYER

An action is maintainable, at the suit of a taxpayer, against city officials, restraining them from entering into a contract of employment, in a position where a civil service examination is required, with one who has not passed the examination, or to restrain the payment of the salary of such an employe out of the funds of the city. (Code Civ. Pro. § 1925; chap. 673, Laws of 1887.) *Peck v. Belknap.* 394

TAX SALES.

Where an infant owner of land, sold in pursuance of the act of 1883 (Chap. 114, Laws of 1883), providing for the settlement and collection of arrearages of unpaid taxes in the city of Brooklyn, was served personally with notice of sale and failed to redeem within the time prescribed by the act, *held*, that the right of redemption and the title of the infant was cut off. *Levy v. Newman.* 11

See VENDOR AND PURCHASER.

TELEGRAPH COMPANIES.

— *As to liability of telegraph company on contract for transmitting press reports to newspapers.*

See *Goodsell v. W. U. T. Co.* 480

TITLE.

1. To vest a title in a *cestui que trust*, under the provisions of the Revised Statutes (1 R. S. 728, § 49, and 729, § 58), declaring that a transfer of real estate to one or more persons, to the use of or in trust for another, shall vest no estate or interest in the trustee, it is essential that the trust be declared by a deed or conveyance in writing (2 R. S. 134, § 6), and the trust must have existed at the time of the grant to the trustee. *Bates v. Ledgerwood Mfg. Co.* 200
2. In 1878 S. executed and delivered to W. a conveyance of certain premises, absolute in form, but which were in fact intended by the parties as collateral security for advances made by W. to S. In 1882 W., at the request of S. conveyed said premises to plaintiff, who assumed a mortgage thereon and paid the balance of the purchase-price in cash, which was the full value of the premises, and S. received the benefit thereof. Plaintiff had no actual notice that the deeds to W. were intended as security only. The premises were at the time of the conveyance in the possession of S. through his tenants, and plaintiff failed to inquire of them as to the title under which they held. Posses-

sion was surrendered to plaintiff after her purchase, and she continued in possession thereafter. In an action to recover damages for injuries from the maintenance of an elevated railroad in front of said premises, and to restrain its future maintenance and operation, S. testified that the conveyance to plaintiff was made with his consent, and that his debt to W. had been paid. The court found that plaintiff has, since the conveyance to him, been seized of an estate of inheritance in fee simple absolute in said premises, and through his agents and servants been in possession of the same. *Held*, no error, that plaintiff's failure to make inquiry of the tenants did not, under the circumstances, affect his position as *bona fide* purchaser; that the general rule that possession is notice to the person proposing to purchase of the rights of the occupant did not apply; also, that S. was estopped from asserting or maintaining any claim to the title, or right to redeem. *Minton v. N. Y. E. R. R. Co.* 332

TRADE-MARK.

1. Where a manufacturer has invented a new name and applied it to an article manufactured by him to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, grade or characteristics, but is arbitrary or fanciful, he is entitled to be protected in the exclusive use of the name as a trade-mark. *Waterman v. Shipman.* 301
2. The use of the name by another manufacturer tends to deceive purchasers, and even if he had no actual intent to deceive, the courts are authorized to interfere, both to protect the private right of the manufacturer who invented it and the public interests. *Id.*
3. The fact that a name so adopted indicates not only that the article is made by the manufacturer, but is an article patented by him, does not affect his exclusive right to use it as a trade-mark. *Id.*

4. In an action to restrain defendants from using the name "Waterman's Ideal Fountain Pen," which plaintiffs claimed as a trade-mark, the trial court found that plaintiff Waterman had, for a long time previous to the commencement of the action, been the manufacturer and inventor of an article known as a fountain pen, which was stamped and labeled with the name specified; this had been adopted by him as "his own proper device and trade-mark, and was known to the public and to buyers and consumers." It appeared also that the pens manufactured by plaintiffs were made under letters patent issued to Waterman, which described the invention as a "fountain pen." Defendants manufactured penholders, stamped them with the same name and offered them for sale. Both Waterman and defendants stamped upon the articles so made and sold by them the dates of the patents issued to Waterman. *Held*, the word "Ideal," as used by Waterman, pointed out simply the maker, and so came within the definition of a trade-mark; that while the whole name pointed out both maker and inventor, this did not affect the right to the exclusive use of that word, and that plaintiffs were entitled to be protected in such use as applied to fountain pens. *Id.*

5. It appeared that W. assigned his letters patent; that S., the assignee granted to him an exclusive license to manufacture and sell fountain penholders under said patents, the license requiring him to make returns and to pay royalties, as specified, to S., and upon failure to do this within a time specified, S. was authorized to terminate the license upon giving written notice to the licensee. Subsequently W. and S. gave to defendants their joint promissory note, and to secure payment thereof S. assigned to them the letters patent, subject, however, to the license granted to W. Defendants transferred the note and their interest in the patents to S. The note was not paid at maturity, and thereafter S. served notice of a revocation of the license on the ground of fail-

ure on the part of the licensee to make returns and payments as prescribed, and then executed to defendants a sole and exclusive license to manufacture and sell fountain pens under the patents. The note was subsequently paid; between its maturity and payment defendants manufactured and sold penholders under the patents similar to and in imitation of those made by W., and stamped "Waterman's Ideal Fountain Pen." After the note was paid, they ceased to manufacture, but continued to sell pens then on hand. It did not appear that plaintiffs manufactured anything covered by the patents during the period for which they made no returns. *Held*, that there was no effective revocation of W.'s license; that the one granted to defendants conferred upon them no right either to make or sell, and so no right to use the name; that while the relief plaintiffs might be entitled to on account of such manufacture by defendants was not involved in the action, as it related not to the use of the invention, but of the trade-mark, they were entitled to an injunction to restrain defendants from using the latter. *Id.*

TRESPASS.

1. An elevated railroad erected in a city street, the right to construct and operate which has not been obtained by purchase from the abutting owners, or by proceedings to condemn, is, as to them, an illegal structure, and a continuing trespass upon their rights, from the time it was built. *Thompson v. Manhattan R. Co.* 360
2. Such a trespass is an injury to the inheritance, and a person seized of an estate in remainder in premises abutting upon the street, may maintain an action for an injunction against the railroad company, "founded upon an injury done to the inheritance, notwithstanding an intervening estate for life." (Code Civ. Pro. §§ 1665, 1681.) *Id.*

TRIAL.

1. Under the act of 1880 (Chap. 147, Laws of 1880), which permitted

the defendant to agree with commissioners appointed by the act on behalf of the city of Rochester, upon a plan to elevate its tracks along and across the city streets, and to close up streets, etc., a portion of a street upon which plaintiff's premises abutted was discontinued, and defendant having previously obtained title to the fee of the street, erected thereon an embankment about fourteen feet high, upon which it laid its tracks, leaving a space between it and said premises so narrow as not to admit of the approach of a team and carriage to them. Plaintiff's premises were used and occupied as a hotel and boarding-house. In an action to recover damages, upon these facts appearing, the court directed a verdict for the defendant. *Held*, error; that the plaintiff established a right to recover, and the question of damages should have been submitted to the jury. *Egerer v. N. Y. C. & H. R. R. Co.* 108

2. Upon the trial of an issue of fact by a referee or by the court without a jury, a refusal to make any finding whatever upon a question of fact, where a request to find is seasonably made by either party, or a finding without any evidence tending to sustain it, is a ruling upon a question of law. (Code Civ. Pro. § 993.) *Van Bokkelen v. Berdell.* 141
3. Upon trial of an action upon a policy of marine insurance, one question was as to whether the vessel was lost before or after the policy expired. There was evidence authorizing the inference that it was before. The plaintiffs conceded that the question was one of fact, but defendant refused to go to the jury on that question, and each party requested the court to direct a verdict in its favor. The court stated that neither party desired to have the facts submitted to the jury, and upon the inferences he was permitted to draw from the evidence, directed a verdict for plaintiff. *Held*, no error. *Reck v. Phenix Ins. Co.* 160

4. B., as the agent of plaintiffs, had charge of certain premises known

as "Glass Buildings;" he deposited the rents collected to the credit of a bank account kept in his name as "Agent Glass Buildings." In payment of a debt which B. owed defendant, as collateral for which the latter held certain securities, he received a check on the bank signed by B., with the words "Agt. Glass Buildings" following his signature, and on receipt surrendered the securities. The check was paid by the bank and charged to said account. B. had no authority to so use the fund. In an action to recover the amount thereof, there was no evidence tending to raise any question as to defendant's good faith, except such receipt of the check. *Held*, that the form of the check was sufficient to indicate to defendant the existence of an agency, and to put him on inquiry as to the agent's authority to so use the money; and so, that a refusal to nonsuit and a submission of the case to the jury was proper. *Gerard v. McCormick.* 261

5. In an action to recover for services rendered, the following facts appeared: Defendant entered into a contract with the city of New York to construct certain sewers. Under said contract the city was authorized to retain, for six months after the work was done, a certain percentage of the contract price for the purpose of repairing the streets through which the sewers were constructed, which the city was authorized to expend only after defendant had, after being notified, refused to make such repairs. Defendant employed H., plaintiff's assignor, to superintend the work, agreeing to pay him for his services one-third of the net profits. The city made payments as the work progressed, and after its completion retained the percentage specified, which was paid to defendant in June, 1888. This action was commenced in January of that year. H. testified that he knew of the terms of defendant's contract with the city. Defendant moved to dismiss the complaint, at the close of plaintiff's evidence, on the ground that the action had been commenced before the contract was completed and before

H.'s interest in the profits had become due. This motion was denied. *Held*, no error; that conceding it was not in the contemplation of the parties that the percentage of H. should become due and payable until the amount thereof could be ascertained, as the city was only authorized to spend for repairs the money retained, and the contractor could not be made liable for a larger sum, upon conclusion of the work, and upon payment of the amount earned less the amount retained, the parties could have determined the net profits and divided the same, leaving their interest, if any, in the amount retained, to be ascertained upon expiration of the six months. *Jenkins v. Dean.* 275

6. Upon the death of one of two joint contractors, the primary liability for a breach of the contract rests upon the survivor, and in order to maintain an action against him and the personal representatives of the decedent jointly, the complaint must allege that the latter is insolvent or unable to pay. In case of the omission of such an averment the defect may be availed of by objection on the trial. *Barnes v. Brown.* 372
7. A plaintiff is not entitled to an amendment of his complaint in this respect on trial before a referee, as a matter of right, and the exercise of his discretion by the referee, in denying the amendment, is not reviewable here. *Id.*
8. Where in an equity action the defendant does not plead want of equitable jurisdiction or allege that plaintiff has an adequate remedy at law, he may not insist upon the trial that an action in equity will not lie. *Watts v. Adler.* 646
9. Upon a trial before a referee defendant presented requests to find, which were refused. He thereupon excepted as follows: Defendant separately excepts "to the refusal of the referee to find each of the several seventeen conclusions submitted to the referee by the said defendant so far as the referee's conclusions are not in con-

formity therewith." *Held*, that such exception was not sufficiently definite and specific to present a question for review. *Daniels v. Smith.* 696

— *When in action upon promissory note brought by a transferee the maker shows it was obtained by fraud, and the plaintiff seeks to establish by his own testimony that he is a bona fide purchaser, although his testimony is undisputed, the question is for the jury, and a direction of a verdict in his favor is error.*

See Joy v. Defendorf. 6

TRUSTS AND TRUSTEES.

1. A certain designated beneficiary is essential to the creation of a valid testamentary trust, and a trust without a beneficiary who can claim its enforcement is void. *Tilden v. Green.* 29

2. The objection is not obviated by the creation of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain the object or objects of the power. *Id.*

3. The rule that where several trusts are created by a will, which are independent of and separable from each other, and each complete in itself, some of which are lawful and others unlawful, the illegal trusts may be cut off and the legal ones permitted to stand, can be applied only in aid and assistance of the manifest intent of the testator and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property. *Id.*

4. When, therefore, the trusts are so connected as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion were retained and others rejected, or if manifest injustice would result from such rejection to the beneficiaries, or some of them, then all

the trusts must be construed together and all must be held illegal. *Id.*

5. The will of T. gave his residuary estate to his executors as trustees, and to their successors in the trust thereby created, "to have and to hold the same * * * during a period not exceeding two lives in being," which were named and "to apply the same and the proceeds thereof to the objects and purposes mentioned" in the will. Those objects and purposes were specified in a clause by which said trustees were requested to procure the incorporation of an institution "with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational purposes" as they should designate. In case such institution was incorporated during the life-time of the survivor of the two lives specified, the trustees were authorized to convey and apply to its use said residuary estate, "or so much thereof as they may deem expedient." In case the institution should not be incorporated during the period limited, "or if for any cause or reason" said trustees "shall deem it inexpedient" to so convey or apply said residue, "or any part thereof," they were authorized to apply the whole or such portion thereof as was not so applied "to such charitable educational purposes" as in their judgment would render it "most widely and substantially beneficial to mankind." In an action brought to obtain a construction of the will, *held* (BRADLEY, POTTER and VANN, JJ., dissenting), that the trust so sought to be created was invalid because of indefiniteness and uncertainty in its objects and purposes, and because it substitutes for the will of the testator that of the trustees and makes that controlling in the disposition of the trust fund; that the power conferred upon the trustees was imperative but not valid because not enforceable at the suit of any beneficiary; that the clauses in question could not be upheld as constituting primarily a separate trust or power in trust for the benefit of the institution,

- with an alternative ulterior provision to be effectual only in case the executors deemed it inexpedient to apply the residue to the corporation; that there was but a single indivisible scheme, *i. e.*, a gift to charitable uses, with a suggestion of or an expression of a preference for the institution as an instrument to execute the donor's purpose, leaving the choice to the executors; no preferential right to the estate, or any part of it being conferred upon the institution. *Id.*
6. The executors caused an institution to be incorporated and organized as desired by the will, and conveyed to it the residuary estate. *Held*, that this had no bearing upon the question as to the validity of the provision, and did not affect the rights of the heirs and next of kin. *Id.*
7. To vest a title in a *cestui que trust*, under the provisions of the Revised Statutes (1 R. S. 728, § 49, and 729, § 58), declaring that a transfer of real estate to one or more persons, to the use of or in trust for another, shall vest no estate or interest in the trustee, it is essential that the trust be declared by a deed or conveyance in writing (2 R. S. 134, § 6), and the trust must have existed at the time of the grant to the trustee. *Bates v. Ledgerwood Mfg. Co.* 200
8. While no particular words in a will are necessary to create a trust, and one may be implied where, from the whole will, it is apparent that to accomplish the purposes of the testator, it will be convenient and advantageous that the executors should be vested with the legal estate; the scheme of the statute is in the direction of such a construction as will vest title to the real estate in the heirs or devisees rather than the executors, if the wishes of the testator may be carried out under a trust power. *Steinhardt v. Cunningham.* 292
9. In such a case, therefore, although there is a devise in terms to executors or trustees to sell or mortgage the real estate, the title descends to the heirs or passes to the devisees subject to the execution of the power. *Id.*
10. It is essential to the constitution of a valid trust, for any of the purposes referred to in the Statute of Uses and Trusts (1 R. S. 728, § 55), that the power of sale conferred upon the trustees be absolute and imperative; a discretionary power of sale is not sufficient. *Id.*
11. The will of F., after directing the payment of his debts, etc., by its terms gave all of his estate to his executors, *i. e.*, his wife and H., to have and to hold the same to themselves, their heirs and assigns forever upon the uses and trusts following." The will then gave various legacies to the testator's children; these were followed by a residuary clause by which he gave all the residue of his estate, "after providing for the aforesaid bequests, * * * absolutely and forever" to his wife. "Full power and authority" was given to the "said trustees, executor and executrix * * * to sell any or all" of the real estate "as they may deem best." The executors were appointed trustees and guardians of the children during their minority. H. omitted to qualify as executor, and letters testamentary were granted to the widow alone. In an action to foreclose a mortgage on certain real estate of which F. died seized, the widow was made a party, but H. was not. Defendant, who acquired title under the foreclosure sale, contracted to sell the same to plaintiff. In an action to recover back moneys paid and expenditures under the contract, on the ground of defect in defendant's title, *held*, that no valid trust was created by the will; that the purposes of the testator could be accomplished through a trust power; that the trustees took no title to the real estate, but the same vested in the widow; and, therefore, that H. was not a necessary party to the foreclosure suit, and defendant acquired a good title under the sale. *Id.*
12. In an action by a creditor of a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848), against its trustees to enforce the liability imposed by said act (§ 12), because

of a failure to file an annual report in January, 1887, L., one of the defendants, claimed that he was not a trustee at that time. It appeared that L. was elected in 1880, and that no subsequent election was held; he testified that after the expiration of a year from his election he had nothing to do with its affairs, except to perform duties as foreman in its shop; that he never attended or was notified to attend any meeting of the trustees, and was never consulted by its officers. It appeared, however, that in December, 1886, in opposition to an application to the attorney-general to bring an action to dissolve the corporation, L. made and read an affidavit in which he stated that he was a trustee and referred to the others as his co-trustees; he reiterated this statement in an affidavit thereafter made to oppose the appointment of a receiver. L. testified in regard to these affidavits that he did not understand when he made them that he was making a statement that he was then a trustee, but supposed he had stated he was once a trustee. *Held*, that the question was one of fact and having been found against the defendant below, it was not reviewable here. *First Nat. Bank v. Lamon*.

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18. The claim of the plaintiff was upon notes given by the corporation in September and October, 1886, which did not mature until after January 20, 1887. The corporation stopped work in its shops and discharged its employes about December 15, 1886. About that time it borrowed a large sum of money giving a mortgage upon its property to secure it. L. testified that it was then solvent. The application to the attorney-general was made December 29, 1886, the ground of which did not appear. The action was commenced by him January 15, 1887. An order to show cause why a receiver should not be appointed was granted January 18 and a receiver appointed March 7, 1887. The bringing of the action and the appointment of a receiver were opposed by two out of four trustees. *Held*, that the trustees were not, under

the circumstances, relieved from the duty of filing the report in question. *Id.*

14. A *cestui que trust* is not required to establish his claim by an action at law in order to compel an enforcement of the trust, or to protect the trust property from unlawful interference. *Spelman v. Freedman*. 421

15. In an action to have a trust canceled and to compel defendant G., the trustee, to reconvey the trust estate to plaintiff from whom he received the conveyance, it appeared that pursuant to a petition presented by G., all the parties to the action the persons interested in the trust estate consenting, an order was granted declaring the allegations in the petition to be true, settling the accounts of G. as trustee, removing and relieving him from the trust, and directing that he should not further interfere with the trust estate. In said petition G. set forth the original declaration of trust and the fact that he had purchased certain real estate, taking title in his own name, paying part of the consideration from the surplus income of the trust estate and securing the remainder by mortgages on the property, and that on the same day he executed an instrument purporting to enlarge the trust so as to include such property, which instrument was also executed by plaintiff and those interested in the trust. The original declaration of trust provided for the collection of the rents and profits of the real estate and the application of the net proceeds for the maintenance of plaintiff during her life, after her death to that of her husband during his life, and after the deaths of both to divide the property or its avails among her children, with power in the trustee to mortgage or dispose of the property, if it should appear to be for the benefit of the trust. *Held*, that the trust first mentioned being valid, it was immaterial whether the others were valid as trusts or as powers in trust, as they were separable from the valid trust, and this could be upheld without conflicting with the

intention of the creator of the trust. *Culross v. Gibbons.* 447

16. On the same day the order was granted, on application of plaintiff another trustee was appointed of all the real estate, with the powers and duties contained in the last declaration of trust. G. was allowed, in his accounts, the amount so paid by him for the property purchased. *Held*, that the orders so made on the application of G. were conclusive upon the parties; that it necessarily determined the question as to whether G. should retain the title, and also that the property so purchased by him was held in trust, and while the order remained in force an action was not sustainable to procure a different determination as to the questions involved therein. *Id.*

17. An executor, as such, takes the unqualified legal title to all personalty not specifically bequeathed, and a qualified legal title to that which is so bequeathed, and holds as trustee for the benefit of, first, his testator's creditors; second, of the distributees under his will, or, if the whole is not bequeathed, under the Statute of Distributions. *Blood v. Kane.* 514

18. The trust estate of a sole executor, who is also the sole devisee and legatee, is solely for the benefit of the testator's creditors; when they are paid, that estate sinks into and is merged with the beneficial interest and he as devisee and legatee becomes vested with the legal title. *Id.*

UNITED STATES.

1. As to whether the federal government can interfere with the right of the state to control and dispose of low flat lands covered with shallow water outside the navigable channel of a river, *quære.* *Rumsey v. N. Y. & N. E. R. R. Co.* 88

2. Where the federal government has not complained of such a grant and where it does not operate to interfere with navigation, no other party may be heard to complain. *Id.*

USAGE.

See CUSTOM.

USURY.

1. The rule which renders void as usurious a note in the hands of a third party who purchased it at a discount greater than the legal rate of interest, applies only to notes that had no inception between the parties thereto, and which were not intended to be available until discounted. *Joy v. Defendorf.* 6

2. Where, therefore, a note was executed and delivered to the payee with intent to represent an existing obligation, it is valid in the hands of a *bona fide* purchaser at a discount greater than the legal rate of interest, although it was obtained by fraud from the maker. *Id.*

3. When an agent, authorized to lend moneys of his principal, but not to take usury, lends such moneys at a usurious rate, and both the sum lent and the usury exacted are secured by the same obligation, which the principal, knowing that it is for a larger amount than the sum loaned, without explanation accepts and has the benefit of, it is an adoption and ratification by him of the act of the agent, and neither the principal nor his assignees can enforce the obligation. *Bliven v. Lydecker.* 102

4. In an action to foreclose a mortgage, the defense to which was usury, it appeared that the agent of the mortgagee made the agreement for the loan apparently in his own name; he exacted as a condition of the loan the payment of a sum of money in excess of lawful interest. This sum was deducted from the amount agreed to be loaned, the mortgagor receiving the balance. There was no evidence that the agent retained this sum from moneys furnished by his principal, or that the latter advanced more than was received by the mortgagor; the mortgagee accepted the mortgage and received interest on the full amount until

she assigned the same to plaintiff. *Held*, that the inference was permissible from the evidence that the mortgagee, in accepting the security, knew it was for a larger sum than she had advanced; and so, in the absence of explanation, a finding was proper that she had notice that usury had been taken, and that, in receiving the benefit thereof, she ratified the action of such agent; and, this having been found, that the mortgage was usurious and void. *Id.*

VENDOR AND PURCHASER.

1. The interest of a vendee, in possession of lands under a contract for the purchase thereof, upon which he has made partial payments, may be levied upon by virtue of an attachment duly issued in an action against him. (Code Civ. Pro. § 645.) *Higgins v. McConnell.* 482
2. A provision in such a contract that the vendee shall not assign the same without the consent of the vendors, is not broken where the transfer is by operation of a judgment. *Id.*
3. An unrecorded conveyance of real estate is not void as against a subsequent purchaser, although for a valuable consideration, who had notice at the time of his purchase of the unrecorded deed; he cannot claim the benefit of the Recording Act. *Dingley v. Bon.* 607
4. A purchaser of real estate is entitled to a marketable title free from reasonable doubt. *Id.*
5. Specific performance of his contract will not be decreed where the title depends upon a disputed question of fact, outside of the record, about which there is reasonable doubt, and when the parties interested therein, are not before the court. *Id.*
6. In an action to compel the specific performance of a contract for the purchase of land, the following facts appeared: The premises were conveyed in 1854 by J. & G. to H.,

by deeds which recited that the grantors had conveyed portions thereof to L., S. & B. and taken back from them mortgages thereon and that the grantors intended to convey their interests in the premises and in said mortgages. Plaintiff took title under said deeds. No deed to L., S. & B. appeared on record. Plaintiff claimed that the recitals in said deeds only amounted to constructive notice, casting upon the purchaser the duty of ascertaining from the records as to the conveyances referred to, and as the records disclosed nothing, the purchaser took an absolute title in fee. *Held*, untenable; and that plaintiff's title was not free from reasonable doubt. *Id.*

7. It appeared that K., plaintiff's grantor, contracted to purchase the premises, but refused to perform his contract because of the recitals in the deeds to H. Thereupon an action to compel specific performance was brought against K. which resulted in a judgment for specific performance; K.'s objections being overruled upon the ground that it appeared the recitals in the deeds were not true in fact, that no deeds were ever given to L., S. or B. but simply executory contracts, which were subsequently canceled and surrendered. K. thereupon took title. *Held*, that as neither L., S. nor B. were made parties to said action, they were not bound by the judgment, and it was not binding upon defendant. *Id.*

See SALES.

WAIVER.

1. A policy of marine insurance contained a warranty that the vessel would not use certain ports specified, between certain dates. The written application for the policy bore date at a day between the dates specified, and stated that the ship was then at one of the prohibited ports. *Held*, that said warranty was waived; and so, that a breach thereof was not a defense to the action. *Reck v. Phenix Ins. Co.* 160

2. A policy of fire insurance issued by defendant contained a clause that in case of disagreement as to amount of loss, the same shall be ascertained by two appraisers, the insured and defendant each selecting one, who were to select "a competent and disinterested umpire." The policy also contained a condition requiring proofs of loss to be furnished within sixty days after the fire, also a provision that the company should not be held to have waived any provision or condition of the policy or the forfeiture by any act, requirement or proceeding on its part relating to an appraisal. In an action upon the policy it appeared that the property insured was destroyed by fire October 15, 1887. Defendant was notified, and on October twenty-first its general agent and adjuster called on plaintiff; they not agreeing as to the amount of loss, entered into a written agreement appointing appraisers; the agent at the time stated to plaintiff that proofs of the loss need not be furnished as the damages would soon be settled. On November twenty-eighth the appraiser appointed by plaintiff declined to act. On December twenty-second plaintiff telegraphed L., the appraiser appointed by defendant, that he had secured another appraiser. L. appointed December thirtieth for making an appraisal. At that date the name of N., the new appraiser, was inserted in the agreement by L. The two appraisers failed to agree, and G. as the jury found refused to agree upon a "disinterested umpire." *Held*, that the condition as to proofs of loss was waived; and that plaintiff was entitled to recover. *Bishop v. Agricultural Ins. Co.* 488
3. While a waiver of a condition of forfeiture contained in a policy of insurance need not be based upon a technical estoppel, in the absence of an express waiver, some of the elements of an estoppel must exist; the insured must have been misled by some action of the company, which caused the omission, to comply with the condition, or it must have done something, after knowledge of a breach of the condition, which could only be done

by virtue of the policy, or required something from the assured which he was bound to do only at the request of the company under a valid policy, or exercised a right which it had only by virtue of such policy. *Armstrong v. Agricultural Ins. Co.* 560

— *When intent to waive fraud may not be presumed.*

See Pryor v. Foster. 171

— *Where cashier of bank misappropriated securities pledged as collateral for a note discounted by bank indorsed by him, held, that the bringing of action and recovery of judgment on note was not waiver of right to sue the sureties on bond given by him, conditioned for the faithful discharge of his duty; that the two remedies were not inconsistent, but concurrent.*

See W. N. Bank v. Birch. 221

WARRANTY.

1. A policy of marine insurance contained a warranty that the vessel insured should not be loaded more than the "registered tonnage" with lead, marble, coal or iron on any one passage. *Held*, that the term "registered tonnage" had reference to that specified in the register under which the vessel sailed, and that, upon an allegation of a breach of the warranty, the question was as to whether the cargo was of greater weight than that specified in the ship's register. *Reck v. Phenix Ins. Co.* 160
2. The vessel was a foreign one. *Held*, that the laws of measurement existing under acts of congress had no application, as the vessel under our law was not qualified to obtain an American register. *Id.*
3. The policy also contained a warranty that the vessel would not use certain ports specified, between certain dates. The written application for the policy bore date at a day between the dates specified, and stated that the ship was then at one of the prohibited ports. *Held*, that said warranty was waived; and so, that a breach thereof was not a defense to the action. *Id.*

WATER-COURSES.

1. Plaintiff, a water-works company, organized under the act providing for the incorporation of such companies (Chap. 737, Laws of 1873, as amended by chap. 415, Laws of 1876), located and constructed a dam and reservoir upon the P. river, and in May, 1886, filed a map showing the location and the lands necessary to be taken, and entered into contracts with several villages to supply them with water. It had, prior to May, 1888, acquired the lands occupied by it, and the right to divert the water of the stream from the riparian owners below the dam, except one H., and had commenced proceedings to acquire his rights. On April 9, 1888, the company adopted a map and plans for two additional reservoirs, which were not contemplated at the time of filing the original map, one to be located on lands acquired by it below the land of H., which map was filed May 7, 1888. It had also acquired the rights from the riparian owners below H. to divert the water at such lower reservoir. Before this, however, but while plaintiff was prosecuting with diligence and in good faith the proceedings to acquire the rights of H., defendants, who composed the board of water commissioners of the village of T., with actual notice of what plaintiff had done, undertook to locate a dam and reservoir upon the lands of H., filed a map thereof and instituted proceedings to condemn for their use the riparian rights of H. In an action to restrain defendants from constructing such dam and reservoir, *held*, that neither plaintiff's original plan, as shown by the map then filed, nor the rights acquired from the riparian owners below, deprived defendants of the right to locate their works upon the same stream below defendants' works; that the fact that defendants succeeded in filing their map before the plaintiff filed its second map, did not necessarily give defendants the exclusive right to condemn and acquire the lower riparian rights; that plaintiff, before filing that map, had the right to enter upon and acquire the lands and

water rights required for the additional reservoir, and that the rights so acquired were not impaired by the filing of defendants' map; nor did that act give to them the right to acquire by condemnation proceedings plaintiff's rights in the stream below; and as their proposed dam and reservoir would interfere with those rights, plaintiff was entitled to the relief sought. *P. W. W. Co. v. Bird.*

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2. Plaintiff, in its contracts with the riparian owners, contracted to supply them with water. It was claimed on the part of defendants that the rights so acquired were not for, and had not been devoted to, the public use, and were not necessary for the purposes of plaintiff's incorporation. *Held*, untenable; that the agreement to supply individuals with water did not destroy the public use, and that the facts justified a finding that said rights were necessary for the purposes of plaintiff's incorporation; that is, to meet the requirements, under all contingencies, of the villages dependent upon it for their water supply. *Id.*

3. The judgment below restrained defendants from constructing and maintaining any reservoir and dam upon the P. river, or from intercepting or diverting any of its waters, or from acquiring any riparian rights therein. *Held*, error, and judgment modified so as only to restrain defendants from erecting any reservoir or dam above the point where plaintiff had located its new reservoir. *Id.*

WATER-WORKS COMPANIES.

1. Plaintiff, a water-works company, organized under the act providing for the incorporation of such companies (Chap. 737, Laws of 1873, as amended by chap. 415, Laws of 1876), located and constructed a dam and reservoir upon the P. river, and in May, 1886, filed a map showing the location and the lands necessary to be taken, and entered into contracts with several villages to supply them with water. It had, prior to May, 1888, acquired the lands occupied by it, and the

right to divert the water of the stream from the riparian owners below the dam, except one H., and had commenced proceedings to acquire his rights. On April 9, 1888, the company adopted a map and plans for two additional reservoirs, which were not contemplated at the time of filing the original map, one to be located on lands acquired by it below the land of H., which map was filed May 7, 1888. It had also acquired the rights from the riparian owners below H. to divert the water at such lower reservoir. Before this, however, but while plaintiff was prosecuting with diligence and in good faith the proceedings to acquire the rights of H., defendants, who composed the board of water commissioners of the village of T., with actual notice of what plaintiff had done, undertook to locate a dam and reservoir upon the lands of H., filed a map thereof and instituted proceedings to condemn for their use the riparian rights of H. In an action to restrain defendants from constructing such dam and reservoir, *held*, that neither plaintiff's original plan, as shown by the map then filed, nor the rights acquired from the riparian owners below, deprived defendants of the right to locate their works upon the same stream below defendants' works; that the fact that defendants succeeded in filing their map before the plaintiff filed its second map, did not necessarily give defendants the exclusive right to condemn and acquire the lower riparian rights; that plaintiff, before filing that map, had the right to enter upon and acquire the lands and water rights required for the additional reservoir, and that the rights so acquired were not impaired by the filing of defendants' map; nor did that act give to them the right to acquire by condemnation proceedings plaintiff's rights in the stream below; and as their proposed dam and reservoir would interfere with those rights, plaintiff was entitled to the relief sought. *P. W. W. Co. v. Bird.* 249

2. Plaintiff, in its contracts with the riparian owners, contracted to

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3. The judgment below restrained defendants from constructing and maintaining any reservoir and dam upon the P. river, or from intercepting and diverting any of its waters, or from acquiring any riparian rights therein. *Held*, error, and judgment modified so as only to restrain defendants from erecting any reservoir or dam above the point where plaintiff had located its new reservoir. *Id.*

WAY.

See HIGHWAY.
PRIVATE WAY.

WILLS.

1. *It seems*, that a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is to be and is called into being within the time allowed for the vesting of future estates. *Tilden v. Green.* 29
2. A certain designated beneficiary is essential to the creation of a valid testamentary trust, and a trust without a beneficiary who can claim its enforcement is void. *Id.*
3. The objection is not obviated by the creation of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain the object or objects of the power. *Id.*

4. So, also, while under the Statute of Powers there may be a power of selection or exclusion with regard to the designated objects, the power of selection must be so defined that there are persons who can come into court and say they are embraced within the class, and demand the enforcement of the power. *Id.*
5. The English doctrine of *cy pres*, which upholds gifts for charitable purposes when no beneficiary is named, has no place in the jurisprudence of this state. *Id.*
6. The rule that where several trusts are created by a will, which are independant of and separable from each other, and each complete in itself, some of which are lawful and others unlawful, the illegal trust may be cut off and the legal ones be permitted to stand, can be applied only in aid and assistance of the manifest intent of the testator and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property. *Id.*
7. When, therefore, the trusts are so connected as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion were retained and others rejected, or if manifest injustice would result from such rejection to the beneficiaries, or some of them, then all the trusts must be construed together and all must be held illegal. *Id.*
8. While, in the construction of a will, the court must so construe its provisions as to effectuate the general intent of the testator as expressed in the whole instrument, and while for this purpose words and phrases may be transposed and its provisions read in an order different from that in which they appear in the instrument, and provisions may be inserted or left out if necessary, this can only be done in aid of the testator's intent and purpose and not to devise a new scheme or to make a new will. *Id.*
9. The will of T. gave his residuary estate to his executors as trustees, and to their successors in the trust thereby created, "to have and to hold the same * * * during a period not exceeding two lives in being," which were named and "to apply the same and the proceeds thereof to the objects and purposes mentioned" in the will. Those objects and purposes were specified in a clause by which said trustees were requested to procure the incorporation of an institution "with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational purposes" as they should designate. In case such institution was incorporated during the lifetime of the survivor of the two lives specified, the trustees were authorized to convey and apply to its use said residuary estate, "or so much thereof as they may deem expedient." In case the institution should not be incorporated during the period limited, "or if for any cause or reason" said trustees "shall deem it inexpedient" to so convey or apply said residue, "or any part thereof," they were authorized to apply the whole or such portion thereof as was not so applied "to such charitable educational purposes" as in their judgment would render it "most widely substantial and beneficial to mankind." In an action brought to obtain a construction of the will, *held* (BRADLEY, POTTER and VANN, JJ., dissenting), that the trust so sought to be created was invalid because of indefiniteness and uncertainty in its objects and purposes, and because it substitutes for the will of the testator that of the trustees and makes that controlling in the distribution of the trust fund; that the power conferred upon the trustees was imperative but not valid, because not enforceable at the suit of any beneficiary; that the clauses in question could not be upheld as constituting primarily a separate trust or power in trust for the benefit of the institution, with an alternative ulterior provision to be effectual only in case the executors deemed it inexpedient to apply the residue to the corporation; that there was not a single indivisible

scheme, *i. e.*, a gift to charitable uses, with a suggestion of or an expression of a preference for the institution as an instrument to execute the donor's purpose, leaving the choice to the executors; no preferential right to the estate, or any part of it being conferred upon the institution. *Id.*

10. The executors caused an institution to be incorporated and organized as desired by the will, and conveyed to it the residuary estate. *Held*, that this had no bearing upon the question as to the validity of the provision, and did not affect the rights of the heirs and next of kin. *Id.*

11. Under the law, as it existed in this state prior to the revision of 1830, a testator could only devise such lands as he was seized and possessed of at the time of the making and publishing of his will save where he was at that time in possession under equities, which the court would enforce, in which case such rights and equities would pass under a devise. *Dodge v. Gallatin.* 117

12. In February, 1807, R. made and published his will by which he devised all his residuary real estate of which he was then or might be seized and possessed of at the time of his death to C. At that time R. was the owner of certain lands in the city of New York, bounded easterly by the high-water mark of the Hudson River; he subsequently petitioned the common council for a grant of land under water in front of his uplands. Such a grant was executed and delivered in November, 1807. R. died in 1809 without republishing his will. In an action of ejectment brought to recover two lots, part of the lands covered by said grant, in which action defendants claimed title under said will, it appeared that in 1794 the board of aldermen of said city passed a resolution to grant the then owner of said uplands the water lots in front thereof. In 1797 the then owner petitioned said board for a grant so that he might build a bulkhead and fill in his water lots; this was referred to a committee,

who reported in favor of a grant, which report was agreed to by the board. It did not appear that any conveyance was executed; but it appeared that the petitioner, prior to 1799, took possession, docked out and filled in the lots and had the use of the property from that time. In 1798 the city presented a petition to the legislature setting forth, among other things, that it had lately directed a permanent street to be laid out at the extremity of its grants "already made and thereafter to be made" on said river, and asking authority to compel the proprietors of the lots fronting thereon to make the street. Thereupon an act was passed (Chap. 80, Laws of 1798), authorizing the city to lay out the street at the expense of the adjoining proprietors and requiring the proprietors of the uplands, who had not acquired title to the land under water, to fill up the space between their lots and said street. The act provided that upon their doing this they shall "be respectively entitled to become the owners of the said intervening space of ground in fee simple." The city accepted the act, and, in pursuance thereof, the then owner of the upland adjoining the land conveyed by said grant, filled in the space between his uplands and said street. *Held*, that these facts disclosed an equitable title in R. at the time of the execution of his will, which passed by the devise. *Id.*

13. *It seems* a controversy as to the amount due upon a contract for the purchase of real estate would not prevent its passing by devise in the will of the purchaser executed prior to 1880; subject, however, to the amount that should be found due. *Id.*

14. While no particular words in a will are necessary to create a trust, and one may be implied where, from the whole will, it is apparent that to accomplish the purposes of the testator, it will be convenient and advantageous that the executors should be vested with the legal estate; the scheme of the statute is in the direction of such a construction as will vest title to

the real estate in the heirs or devisees rather than the executors, if the wishes of the testator may be carried out under a trust power. *Steinhardt v. Cunningham.* 292

15. In such a case, therefore, although there is a devise in terms to executors or trustees to sell or mortgage the real estate, the title descends to the heirs or passes to the devisees subject to the execution of the power. *Id.*

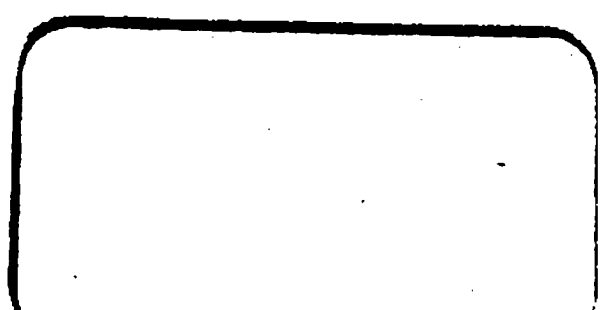
16. It is essential to the constitution of a valid trust, for any of the purposes referred to in the Statute of Uses and Trusts (1 R. S. 728, § 55), that the power of sale conferred upon the trustees be absolute and imperative; a discretionary power of sale is not sufficient. *Id.*

17. The will of F., after directing the payment of his debts, etc., by its terms gave all of his estate to his executors, *i. e.*, his wife and H., "to have and to hold the same to themselves, their heirs and assigns forever upon the uses and trusts following." The will then gave various legacies to the testator's children; these were followed by a residuary clause by which he

gave all the residue of his estate, "after providing for the aforesaid bequests, * * * absolutely and forever" to his wife. "Full power and authority" was given to the "said trustees, executor and executrix * * * to sell any or all" of the real estate "as they may deem best." The executors were appointed trustees and guardians of the children during their minority. H. omitted to qualify as executor, and letters testamentary were granted to the widow alone. In an action to foreclose a mortgage on certain real estate of which F. died seized, the widow was made a party, but H. was not. Defendant, who acquired title under the foreclosure sale, contracted to sell the same to plaintiff. In an action to recover back moneys paid and expenditures under the contract, on the ground of defect in defendant's title, *held*, that no valid trust was created by the will; that the purposes of the testator could be accomplished through a trust power; that the trustees took no title to the real estate, but the same vested in the widow; and, therefore, that H. was not a necessary party to the foreclosure suit, and defendant acquired a good title under the sale. *Id.*

Ex. 115.

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as "Glass Buildings;" he deposited the rents collected to the credit of a bank account kept in his name as "Agent Glass Buildings." In payment of a debt which B. owed defendant, as collateral for which the latter held certain securities, he received a check on the bank signed by B., with the words "Agt. Glass Buildings" following his signature, and on receipt surrendered the securities. The check was paid by the bank and charged to said account. B. had no authority to so use the fund. In an action to recover the amount thereof, there was no evidence tending to raise any question as to defendant's good faith, except such receipt of the check. *Held*, that the form of the check was sufficient to indicate to defendant the existence of an agency, and to put him on inquiry as to the agent's authority to so use the money; and so, that a refusal to nonsuit and a submission of the case to the jury was proper. *Gerard v. McCormick.* 261

5. In an action to recover for services rendered, the following facts appeared: Defendant entered into a contract with the city of New York to construct certain sewers. Under said contract the city was authorized to retain, for six months after the work was done, a certain percentage of the contract price for the purpose of repairing the streets through which the sewers were constructed, which the city was authorized to expend only after defendant had, after being notified, refused to make such repairs. Defendant employed H., plaintiff's assignor, to superintend the work, agreeing to pay him for his services one-third of the net profits. The city made payments as the work progressed, and after its completion retained the percentage specified, which was paid to defendant in June, 1888. This action was commenced in January of that year. H. testified that he knew of the terms of defendant's contract with the city. Defendant moved to dismiss the complaint, at the close of plaintiff's evidence, on the ground that the action had been commenced before the contract was completed and before

H.'s interest in the profits had become due. This motion was denied. *Held*, no error; that conceding it was not in the contemplation of the parties that the percentage of H. should become due and payable until the amount thereof could be ascertained, as the city was only authorized to spend for repairs the money retained, and the contractor could not be made liable for a larger sum, upon conclusion of the work, and upon payment of the amount earned less the amount retained, the parties could have determined the net profits and divided the same, leaving their interest, if any, in the amount retained, to be ascertained upon expiration of the six months. *Jenkins v. Dean.* 275

6. Upon the death of one of two joint contractors, the primary liability for a breach of the contract rests upon the survivor, and in order to maintain an action against him and the personal representatives of the decedent jointly, the complaint must allege that the latter is insolvent or unable to pay. In case of the omission of such an averment the defect may be availed of by objection on the trial. *Barnes v. Brown.* 372
7. A plaintiff is not entitled to an amendment of his complaint in this respect on trial before a referee, as a matter of right, and the exercise of his discretion by the referee, in denying the amendment, is not reviewable here. *Id.*
8. Where in an equity action the defendant does not plead want of equitable jurisdiction or allege that plaintiff has an adequate remedy at law, he may not insist upon the trial that an action in equity will not lie. *Watts v. Adler.* 646
9. Upon a trial before a referee defendant presented requests to find, which were refused. He thereupon excepted as follows: Defendant separately excepts "to the refusal of the referee to find each of the several seventeen conclusions submitted to the referee by the said defendant so far as the referee's conclusions are not in con-

formity therewith." *Held*, that such exception was not sufficiently definite and specific to present a question for review. *Daniels v. Smith.* 696

— *When in action upon promissory note brought by a transferee the maker shows it was obtained by fraud, and the plaintiff seeks to establish by his own testimony that he is a bona fide purchaser, although his testimony is undisputed, the question is for the jury, and a direction of a verdict in his favor is error.*

See Joy v. Defendorf. 6

TRUSTS AND TRUSTEES.

1. A certain designated beneficiary is essential to the creation of a valid testamentary trust, and a trust without a beneficiary who can claim its enforcement is void. *Tilden v. Green.* 29

2. The objection is not obviated by the creation of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain the object or objects of the power. *Id.*

3. The rule that where several trusts are created by a will, which are independent of and separable from each other, and each complete in itself, some of which are lawful and others unlawful, the illegal trusts may be cut off and the legal ones permitted to stand, can be applied only in aid and assistance of the manifest intent of the testator and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property. *Id.*

4. When, therefore, the trusts are so connected as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion were retained and others rejected, or if manifest injustice would result from such rejection to the beneficiaries, or some of them, then all

the trusts must be construed together and all must be held illegal. *Id.*

5. The will of T. gave his residuary estate to his executors as trustees, and to their successors in the trust thereby created, "to have and to hold the same * * * during a period not exceeding two lives in being," which were named and "to apply the same and the proceeds thereof to the objects and purposes mentioned" in the will. Those objects and purposes were specified in a clause by which said trustees were requested to procure the incorporation of an institution "with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational purposes" as they should designate. In case such institution was incorporated during the life-time of the survivor of the two lives specified, the trustees were authorized to convey and apply to its use said residuary estate, "or so much thereof as they may deem expedient." In case the institution should not be incorporated during the period limited, "or if for any cause or reason" said trustees "shall deem it inexpedient" to so convey or apply said residue, "or any part thereof," they were authorized to apply the whole or such portion thereof as was not so applied "to such charitable educational purposes" as in their judgment would render it "most widely and substantially beneficial to mankind." In an action brought to obtain a construction of the will, *held* (BRADLEY, POTTER and VANN, JJ., dissenting), that the trust so sought to be created was invalid because of indefiniteness and uncertainty in its objects and purposes, and because it substitutes for the will of the testator that of the trustees and makes that controlling in the disposition of the trust fund; that the power conferred upon the trustees was imperative but not valid because not enforceable at the suit of any beneficiary; that the clauses in question could not be upheld as constituting primarily a separate trust or power in trust for the benefit of the institution,

- with an alternative ulterior provision to be effectual only in case the executors deemed it inexpedient to apply the residue to the corporation; that there was but a single indivisible scheme, *i. e.*, a gift to charitable uses, with a suggestion of or an expression of a preference for the institution as an instrument to execute the donor's purpose, leaving the choice to the executors; no preferential right to the estate, or any part of it being conferred upon the institution. *Id.*
6. The executors caused an institution to be incorporated and organized as desired by the will, and conveyed to it the residuary estate. *Held*, that this had no bearing upon the question as to the validity of the provision, and did not affect the rights of the heirs and next of kin. *Id.*
7. To vest a title in a *cestui que trust*, under the provisions of the Revised Statutes (1 R. S. 728, § 49, and 729, § 58), declaring that a transfer of real estate to one or more persons, to the use of or in trust for another, shall vest no estate or interest in the trustee, it is essential that the trust be declared by a deed or conveyance in writing (2 R. S. 134, § 6), and the trust must have existed at the time of the grant to the trustee. *Bates v. Ledgerwood Mfg. Co.* 200
8. While no particular words in a will are necessary to create a trust, and one may be implied where, from the whole will, it is apparent that to accomplish the purposes of the testator, it will be convenient and advantageous that the executors should be vested with the legal estate; the scheme of the statute is in the direction of such a construction as will vest title to the real estate in the heirs or devisees rather than the executors, if the wishes of the testator may be carried out under a trust power. *Steinhardt v. Cunningham.* 292
9. In such a case, therefore, although there is a devise in terms to executors or trustees to sell or mortgage the real estate, the title descends to the heirs or passes to the devisees subject to the execution of the power. *Id.*
10. It is essential to the constitution of a valid trust, for any of the purposes referred to in the Statute of Uses and Trusts (1 R. S. 728, § 55), that the power of sale conferred upon the trustees be absolute and imperative; a discretionary power of sale is not sufficient. *Id.*
11. The will of F., after directing the payment of his debts, etc., by its terms gave all of his estate to his executors, *i. e.*, his wife and H., to have and to hold the same to themselves, their heirs and assigns forever upon the uses and trusts following." The will then gave various legacies to the testator's children; these were followed by a residuary clause by which he gave all the residue of his estate, "after providing for the aforesaid bequests, * * * absolutely and forever" to his wife. "Full power and authority" was given to the "said trustees, executor and executrix * * * to sell any or all" of the real estate "as they may deem best." The executors were appointed trustees and guardians of the children during their minority. H. omitted to qualify as executor, and letters testamentary were granted to the widow alone. In an action to foreclose a mortgage on certain real estate of which F. died seized, the widow was made a party, but H. was not. Defendant, who acquired title under the foreclosure sale, contracted to sell the same to plaintiff. In an action to recover back moneys paid and expenditures under the contract, on the ground of defect in defendant's title, *held*, that no valid trust was created by the will; that the purposes of the testator could be accomplished through a trust power; that the trustees took no title to the real estate, but the same vested in the widow; and, therefore, that H. was not a necessary party to the foreclosure suit, and defendant acquired a good title under the sale. *Id.*
12. In an action by a creditor of a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848), against its trustees to enforce the liability imposed by said act (§ 12), because

of a failure to file an annual report in January, 1887, L., one of the defendants, claimed that he was not a trustee at that time. It appeared that L. was elected in 1880, and that no subsequent election was held; he testified that after the expiration of a year from his election he had nothing to do with its affairs, except to perform duties as foreman in its shop; that he never attended or was notified to attend any meeting of the trustees, and was never consulted by its officers. It appeared, however, that in December, 1886, in opposition to an application to the attorney-general to bring an action to dissolve the corporation, L. made and read an affidavit in which he stated that he was a trustee and referred to the others as his co-trustees; he reiterated this statement in an affidavit thereafter made to oppose the appointment of a receiver. L. testified in regard to these affidavits that he did not understand when he made them that he was making a statement that he was then a trustee, but supposed he had stated he was once a trustee. *Held*, that the question was one of fact and having been found against the defendant below, it was not reviewable here. *First Nat. Bank v. Lamon*.

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13. The claim of the plaintiff was upon notes given by the corporation in September and October, 1886, which did not mature until after January 20, 1887. The corporation stopped work in its shops and discharged its employes about December 15, 1886. About that time it borrowed a large sum of money giving a mortgage upon its property to secure it. L. testified that it was then solvent. The application to the attorney-general was made December 29, 1886, the ground of which did not appear. The action was commenced by him January 15, 1887. An order to show cause why a receiver should not be appointed was granted January 18 and a receiver appointed March 7, 1887. The bringing of the action and the appointment of a receiver were opposed by two out of four trustees. *Held*, that the trustees were not, under

the circumstances, relieved from the duty of filing the report in question. *Id.*

14. A *cestui que trust* is not required to establish his claim by an action at law in order to compel an enforcement of the trust, or to protect the trust property from unlawful interference. *Spelman v. Freedman*. 421

15. In an action to have a trust canceled and to compel defendant G., the trustee, to reconvey the trust estate to plaintiff from whom he received the conveyance, it appeared that pursuant to a petition presented by G., all the parties to the action the persons interested in the trust estate consenting, an order was granted declaring the allegations in the petition to be true, settling the accounts of G. as trustee, removing and relieving him from the trust, and directing that he should not further interfere with the trust estate. In said petition G. set forth the original declaration of trust and the fact that he had purchased certain real estate, taking title in his own name, paying part of the consideration from the surplus income of the trust estate and securing the remainder by mortgages on the property, and that on the same day he executed an instrument purporting to enlarge the trust so as to include such property, which instrument was also executed by plaintiff and those interested in the trust. The original declaration of trust provided for the collection of the rents and profits of the real estate and the application of the net proceeds for the maintenance of plaintiff during her life, after her death to that of her husband during his life, and after the deaths of both to divide the property or its avails among her children, with power in the trustee to mortgage or dispose of the property, if it should appear to be for the benefit of the trust. *Held*, that the trust first mentioned being valid, it was immaterial whether the others were valid as trusts or as powers in trust, as they were separable from the valid trust, and this could be upheld without conflicting with the

intention of the creator of the trust. *Culross v. Gibbons*. 447

16. On the same day the order was granted, on application of plaintiff another trustee was appointed of all the real estate, with the powers and duties contained in the last declaration of trust. G. was allowed, in his accounts, the amount so paid by him for the property purchased. *Held*, that the orders so made on the application of G. were conclusive upon the parties; that it necessarily determined the question as to whether G. should retain the title, and also that the property so purchased by him was held in trust, and while the order remained in force an action was not sustainable to procure a different determination as to the questions involved therein. *Id.*

17. An executor, as such, takes the unqualified legal title to all personalty not specifically bequeathed, and a qualified legal title to that which is so bequeathed, and holds as trustee for the benefit of, first, his testator's creditors; second, of the distributees under his will, or, if the whole is not bequeathed, under the Statute of Distributions. *Blood v. Kane*. 514

18. The trust estate of a sole executor, who is also the sole devisee and legatee, is solely for the benefit of the testator's creditors; when they are paid, that estate sinks into and is merged with the beneficial interest and he as devisee and legatee becomes vested with the legal title. *Id.*

UNITED STATES.

1. As to whether the federal government can interfere with the right of the state to control and dispose of low flat lands covered with shallow water outside the navigable channel of a river, *quære*. *Rumsey v. N. Y. & N. E. R. R. Co.* 88

2. Where the federal government has not complained of such a grant and where it does not operate to interfere with navigation, no other party may be heard to complain. *Id.*

USAGE.

See CUSTOM.

USURY.

1. The rule which renders void as usurious a note in the hands of a third party who purchased it at a discount greater than the legal rate of interest, applies only to notes that had no inception between the parties thereto, and which were not intended to be available until discounted. *Joy v. Defendorf*. 6

2. Where, therefore, a note was executed and delivered to the payee with intent to represent an existing obligation, it is valid in the hands of a *bona fide* purchaser at a discount greater than the legal rate of interest, although it was obtained by fraud from the maker. *Id.*

3. When an agent, authorized to lend moneys of his principal, but not to take usury, lends such moneys at a usurious rate, and both the sum lent and the usury exacted are secured by the same obligation, which the principal, knowing that it is for a larger amount than the sum loaned, without explanation accepts and has the benefit of, it is an adoption and ratification by him of the act of the agent, and neither the principal nor his assignees can enforce the obligation. *Bliven v. Lydecker*. 102

4. In an action to foreclose a mortgage, the defense to which was usury, it appeared that the agent of the mortgagee made the agreement for the loan apparently in his own name; he exacted as a condition of the loan the payment of a sum of money in excess of lawful interest. This sum was deducted from the amount agreed to be loaned, the mortgagor receiving the balance. There was no evidence that the agent retained this sum from moneys furnished by his principal, or that the latter advanced more than was received by the mortgagor; the mortgagee accepted the mortgage and received interest on the full amount until

she assigned the same to plaintiff. *Held*, that the inference was permissible from the evidence that the mortgagee, in accepting the security, knew it was for a larger sum than she had advanced; and so, in the absence of explanation, a finding was proper that she had notice that usury had been taken, and that, in receiving the benefit thereof, she ratified the action of such agent; and, this having been found, that the mortgage was usurious and void. *Id.*

VENDOR AND PURCHASER.

1. The interest of a vendee, in possession of lands under a contract for the purchase thereof, upon which he has made partial payments, may be levied upon by virtue of an attachment duly issued in an action against him. (Code Civ. Pro. § 645.) *Higgins v. McConnell.* 482
2. A provision in such a contract that the vendee shall not assign the same without the consent of the vendors, is not broken where the transfer is by operation of a judgment. *Id.*
3. An unrecorded conveyance of real estate is not void as against a subsequent purchaser, although for a valuable consideration, who had notice at the time of his purchase of the unrecorded deed; he cannot claim the benefit of the Recording Act. *Dingley v. Bon.* 607
4. A purchaser of real estate is entitled to a marketable title free from reasonable doubt. *Id.*
5. Specific performance of his contract will not be decreed where the title depends upon a disputed question of fact, outside of the record, about which there is reasonable doubt, and when the parties interested therein, are not before the court. *Id.*
6. In an action to compel the specific performance of a contract for the purchase of land, the following facts appeared: The premises were conveyed in 1854 by J. & G. to H.,

by deeds which recited that the grantors had conveyed portions thereof to L., S. & B. and taken back from them mortgages thereon and that the grantors intended to convey their interests in the premises and in said mortgages. Plaintiff took title under said deeds. No deed to L., S. & B. appeared on record. Plaintiff claimed that the recitals in said deeds only amounted to constructive notice, casting upon the purchaser the duty of ascertaining from the records as to the conveyances referred to, and as the records disclosed nothing, the purchaser took an absolute title in fee. *Held*, untenable; and that plaintiff's title was not free from reasonable doubt. *Id.*

7. It appeared that K., plaintiff's grantor, contracted to purchase the premises, but refused to perform his contract because of the recitals in the deeds to H. Thereupon an action to compel specific performance was brought against K. which resulted in a judgment for specific performance; K.'s objections being overruled upon the ground that it appeared the recitals in the deeds were not true in fact, that no deeds were ever given to L., S. or B. but simply executory contracts, which were subsequently canceled and surrendered. K. thereupon took title. *Held*, that as neither L., S. nor B. were made parties to said action, they were not bound by the judgment, and it was not binding upon defendant. *Id.*

See SALES.

WAIVER.

1. A policy of marine insurance contained a warranty that the vessel would not use certain ports specified, between certain dates. The written application for the policy bore date at a day between the dates specified, and stated that the ship was then at one of the prohibited ports. *Held*, that said warranty was waived; and so, that a breach thereof was not a defense to the action. *Reck v. Phenix Ins. Co.* 160

2. A policy of fire insurance issued by defendant contained a clause that in case of disagreement as to amount of loss, the same shall be ascertained by two appraisers, the insured and defendant each selecting one, who were to select "a competent and disinterested umpire." The policy also contained a condition requiring proofs of loss to be furnished within sixty days after the fire, also a provision that the company should not be held to have waived any provision or condition of the policy or the forfeiture by any act, requirement or proceeding on its part relating to an appraisal. In an action upon the policy it appeared that the property insured was destroyed by fire October 15, 1887. Defendant was notified, and on October twenty-first its general agent and adjuster called on plaintiff; they not agreeing as to the amount of loss, entered into a written agreement appointing appraisers; the agent at the time stated to plaintiff that proofs of the loss need not be furnished as the damages would soon be settled. On November twenty-eighth the appraiser appointed by plaintiff declined to act. On December twenty-second plaintiff telegraphed L., the appraiser appointed by defendant, that he had secured another appraiser. L. appointed December thirtieth for making an appraisal. At that date the name of N., the new appraiser, was inserted in the agreement by L. The two appraisers failed to agree, and G. as the jury found refused to agree upon a "disinterested umpire." *Held*, that the condition as to proofs of loss was waived; and that plaintiff was entitled to recover. *Bishop v. Agricultural Ins. Co.* 488
3. While a waiver of a condition of forfeiture contained in a policy of insurance need not be based upon a technical estoppel, in the absence of an express waiver, some of the elements of an estoppel must exist; the insured must have been misled by some action of the company, which caused the omission, to comply with the condition, or it must have done something, after knowledge of a breach of the condition, which could only be done

by virtue of the policy, or required something from the assured which he was bound to do only at the request of the company under a valid policy, or exercised a right which it had only by virtue of such policy. *Armstrong v. Agricultural Ins. Co.* 560

— *When intent to waive fraud may not be presumed.*

See Pryor v. Foster. 171

— *Where cashier of bank misappropriated securities pledged as collateral for a note discounted by bank indorsed by him, held, that the bringing of action and recovery of judgment on note was not waiver of right to sue the sureties on bond given by him, conditioned for the faithful discharge of his duty; that the two remedies were not inconsistent, but concurrent.*

See W. N. Bank v. Birch. 221

WARRANTY.

1. A policy of marine insurance contained a warranty that the vessel insured should not be loaded more than the "registered tonnage" with lead, marble, coal or iron on any one passage. *Held*, that the term "registered tonnage" had reference to that specified in the register under which the vessel sailed, and that, upon an allegation of a breach of the warranty, the question was as to whether the cargo was of greater weight than that specified in the ship's register. *Reck v. Phenix Ins. Co.* 160
2. The vessel was a foreign one. *Held*, that the laws of measurement existing under acts of congress had no application, as the vessel under our law was not qualified to obtain an American register. *Id.*
3. The policy also contained a warranty that the vessel would not use certain ports specified, between certain dates. The written application for the policy bore date at a day between the dates specified, and stated that the ship was then at one of the prohibited ports. *Held*, that said warranty was waived; and so, that a breach thereof was not a defense to the action. *Id.*

WATER-COURSES.

1. Plaintiff, a water-works company, organized under the act providing for the incorporation of such companies (Chap. 737, Laws of 1873, as amended by chap. 415, Laws of 1876), located and constructed a dam and reservoir upon the P. river, and in May, 1886, filed a map showing the location and the lands necessary to be taken, and entered into contracts with several villages to supply them with water. It had, prior to May, 1888, acquired the lands occupied by it, and the right to divert the water of the stream from the riparian owners below the dam, except one H., and had commenced proceedings to acquire his rights. On April 9, 1888, the company adopted a map and plans for two additional reservoirs, which were not contemplated at the time of filing the original map, one to be located on lands acquired by it below the land of H., which map was filed May 7, 1888. It had also acquired the rights from the riparian owners below H. to divert the water at such lower reservoir. Before this, however, but while plaintiff was prosecuting with diligence and in good faith the proceedings to acquire the rights of H., defendants, who composed the board of water commissioners of the village of T., with actual notice of what plaintiff had done, undertook to locate a dam and reservoir upon the lands of H., filed a map thereof and instituted proceedings to condemn for their use the riparian rights of H. In an action to restrain defendants from constructing such dam and reservoir, *held*, that neither plaintiff's original plan, as shown by the map then filed, nor the rights acquired from the riparian owners below, deprived defendants of the right to locate their works upon the same stream below defendants' works; that the fact that defendants succeeded in filing their map before the plaintiff filed its second map, did not necessarily give defendants the exclusive right to condemn and acquire the lower riparian rights; that plaintiff, before filing that map, had the right to enter upon and acquire the lands and

water rights required for the additional reservoir, and that the rights so acquired were not impaired by the filing of defendants' map; nor did that act give to them the right to acquire by condemnation proceedings plaintiff's rights in the stream below; and as their proposed dam and reservoir would interfere with those rights, plaintiff was entitled to the relief sought. *P. W. W. Co. v. Bird.*

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2. Plaintiff, in its contracts with the riparian owners, contracted to supply them with water. It was claimed on the part of defendants that the rights so acquired were not for, and had not been devoted to, the public use, and were not necessary for the purposes of plaintiff's incorporation. *Held*, untenable; that the agreement to supply individuals with water did not destroy the public use, and that the facts justified a finding that said rights were necessary for the purposes of plaintiff's incorporation; that is, to meet the requirements, under all contingencies, of the villages dependent upon it for their water supply. *Id.*
3. The judgment below restrained defendants from constructing and maintaining any reservoir and dam upon the P. river, or from intercepting or diverting any of its waters, or from acquiring any riparian rights therein. *Held*, error, and judgment modified so as only to restrain defendants from erecting any reservoir or dam above the point where plaintiff had located its new reservoir. *Id.*

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WAY.

See HIGHWAY.
PRIVATE WAY.

WILLS.

1. *It seems*, that a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is to be and is called into being within the time allowed for the vesting of future estates. *Tilden v. Green.* 29
2. A certain designated beneficiary is essential to the creation of a valid testamentary trust, and a trust without a beneficiary who can claim its enforcement is void. *Id.*
3. The objection is not obviated by the creation of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain the object or objects of the power. *Id.*

4. So, also, while under the Statute of Powers there may be a power of selection or exclusion with regard to the designated objects, the power of selection must be so defined that there are persons who can come into court and say they are embraced within the class, and demand the enforcement of the power. *Id.*
5. The English doctrine of *cy pres*, which upholds gifts for charitable purposes when no beneficiary is named, has no place in the jurisprudence of this state. *Id.*
6. The rule that where several trusts are created by a will, which are independant of and separable from each other, and each complete in itself, some of which are lawful and others unlawful, the illegal trust may be cut off and the legal ones be permitted to stand, can be applied only in aid and assistance of the manifest intent of the testator and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property. *Id.*
7. When, therefore, the trusts are so connected as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion were retained and others rejected, or if manifest injustice would result from such rejection to the beneficiaries, or some of them, then all the trusts must be construed together and all must be held illegal. *Id.*
8. While, in the construction of a will, the court must so construe its provisions as to effectuate the general intent of the testator as expressed in the whole instrument, and while for this purpose words and phrases may be transposed and its provisions read in an order different from that in which they appear in the instrument, and provisions may be inserted or left out if necessary, this can only be done in aid of the testator's intent and purpose and not to devise a new scheme or to make a new will. *Id.*
9. The will of T. gave his residuary estate to his executors as trustees, and to their successors in the trust thereby created, "to have and to hold the same * * * during a period not exceeding two lives in being," which were named and "to apply the same and the proceeds thereof to the objects and purposes mentioned" in the will. Those objects and purposes were specified in a clause by which said trustees were requested to procure the incorporation of an institution "with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational purposes" as they should designate. In case such institution was incorporated during the lifetime of the survivor of the two lives specified, the trustees were authorized to convey and apply to its use said residuary estate, "or so much thereof as they may deem expedient." In case the institution should not be incorporated during the period limited, "or if for any cause or reason" said trustees "shall deem it inexpedient" to so convey or apply said residue, "or any part thereof," they were authorized to apply the whole or such portion thereof as was not so applied "to such charitable educational purposes" as in their judgment would render it "most widely substantial and beneficial to mankind." In an action brought to obtain a construction of the will, *held* (BRADLEY, POTTER and VANN, JJ., dissenting), that the trust so sought to be created was invalid because of indefiniteness and uncertainty in its objects and purposes, and because it substitutes for the will of the testator that of the trustees and makes that controlling in the distribution of the trust fund; that the power conferred upon the trustees was imperative but not valid, because not enforceable at the suit of any beneficiary; that the clauses in question could not be upheld as constituting primarily a separate trust or power in trust for the benefit of the institution, with an alternative ulterior provision to be effectual only in case the executors deemed it inexpedient to apply the residue to the corporation; that there was not a single indivisible

scheme, *i. e.*, a gift to charitable uses, with a suggestion of or an expression of a preference for the institution as an instrument to execute the donor's purpose, leaving the choice to the executors; no preferential right to the estate, or any part of it being conferred upon the institution. *Id.*

10. The executors caused an institution to be incorporated and organized as desired by the will, and conveyed to it the residuary estate. *Held*, that this had no bearing upon the question as to the validity of the provision, and did not affect the rights of the heirs and next of kin. *Id.*

11. Under the law, as it existed in this state prior to the revision of 1830, a testator could only devise such lands as he was seized and possessed of at the time of the making and publishing of his will save where he was at that time in possession under equities, which the court would enforce, in which case such rights and equities would pass under a devise. *Dodge v. Gallatin.* 117

12. In February, 1807, R. made and published his will by which he devised all his residuary real estate of which he was then or might be seized and possessed of at the time of his death to C. At that time R. was the owner of certain lands in the city of New York, bounded easterly by the high-water mark of the Hudson River; he subsequently petitioned the common council for a grant of land under water in front of his uplands. Such a grant was executed and delivered in November, 1807. R. died in 1809 without republishing his will. In an action of ejectment brought to recover two lots, part of the lands covered by said grant, in which action defendants claimed title under said will, it appeared that in 1794 the board of aldermen of said city passed a resolution to grant the then owner of said uplands the water lots in front thereof. In 1797 the then owner petitioned said board for a grant so that he might build a bulkhead and fill in his water lots; this was referred to a committee,

who reported in favor of a grant, which report was agreed to by the board. It did not appear that any conveyance was executed; but it appeared that the petitioner, prior to 1799, took possession, docked out and filled in the lots and had the use of the property from that time. In 1798 the city presented a petition to the legislature setting forth, among other things, that it had lately directed a permanent street to be laid out at the extremity of its grants "already made and thereafter to be made" on said river, and asking authority to compel the proprietors of the lots fronting thereon to make the street. Thereupon an act was passed (Chap. 80, Laws of 1798), authorizing the city to lay out the street at the expense of the adjoining proprietors and requiring the proprietors of the uplands, who had not acquired title to the land under water, to fill up the space between their lots and said street. The act provided that upon their doing this they shall "be respectively entitled to become the owners of the said intervening space of ground in fee simple." The city accepted the act, and, in pursuance thereof, the then owner of the upland adjoining the land conveyed by said grant, filled in the space between his uplands and said street. *Held*, that these facts disclosed an equitable title in R. at the time of the execution of his will, which passed by the devise. *Id.*

13. *It seems* a controversy as to the amount due upon a contract for the purchase of real estate would not prevent its passing by devise in the will of the purchaser executed prior to 1880; subject, however, to the amount that should be found due. *Id.*

14. While no particular words in a will are necessary to create a trust, and one may be implied where, from the whole will, it is apparent that to accomplish the purposes of the testator, it will be convenient and advantageous that the executors should be vested with the legal estate; the scheme of the statute is in the direction of such a construction as will vest title to

the real estate in the heirs or devisees rather than the executors, if the wishes of the testator may be carried out under a trust power. *Steinhardt v. Cunningham.* 292

15. In such a case, therefore, although there is a devise in terms to executors or trustees to sell or mortgage the real estate, the title descends to the heirs or passes to the devisees subject to the execution of the power. *Id.*

16. It is essential to the constitution of a valid trust, for any of the purposes referred to in the Statute of Uses and Trusts (1 R. S. 728, § 55), that the power of sale conferred upon the trustees be absolute and imperative; a discretionary power of sale is not sufficient. *Id.*

17. The will of F., after directing the payment of his debts, etc., by its terms gave all of his estate to his executors, i. e., his wife and H., "to have and to hold the same to themselves, their heirs and assigns forever upon the uses and trusts following." The will then gave various legacies to the testator's children; these were followed by a residuary clause by which he

gave all the residue of his estate, "after providing for the aforesaid bequests, * * * absolutely and forever" to his wife. "Full power and authority" was given to the "said trustees, executor and executrix * * * to sell any or all" of the real estate "as they may deem best." The executors were appointed trustees and guardians of the children during their minority. H. omitted to qualify as executor, and letters testamentary were granted to the widow alone. In an action to foreclose a mortgage on certain real estate of which F. died seized, the widow was made a party, but H. was not. Defendant, who acquired title under the foreclosure sale, contracted to sell the same to plaintiff. In an action to recover back moneys paid and expenditures under the contract, on the ground of defect in defendant's title, *held*, that no valid trust was created by the will; that the purposes of the testator could be accomplished through a trust power; that the trustees took no title to the real estate, but the same vested in the widow; and, therefore, that H. was not a necessary party to the foreclosure suit, and defendant acquired a good title under the sale. *Id.*

Ex. v. H. S.

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